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Fall 1999

# Clark Memorandum: Fall 1999

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J. Reuben Clark Law School

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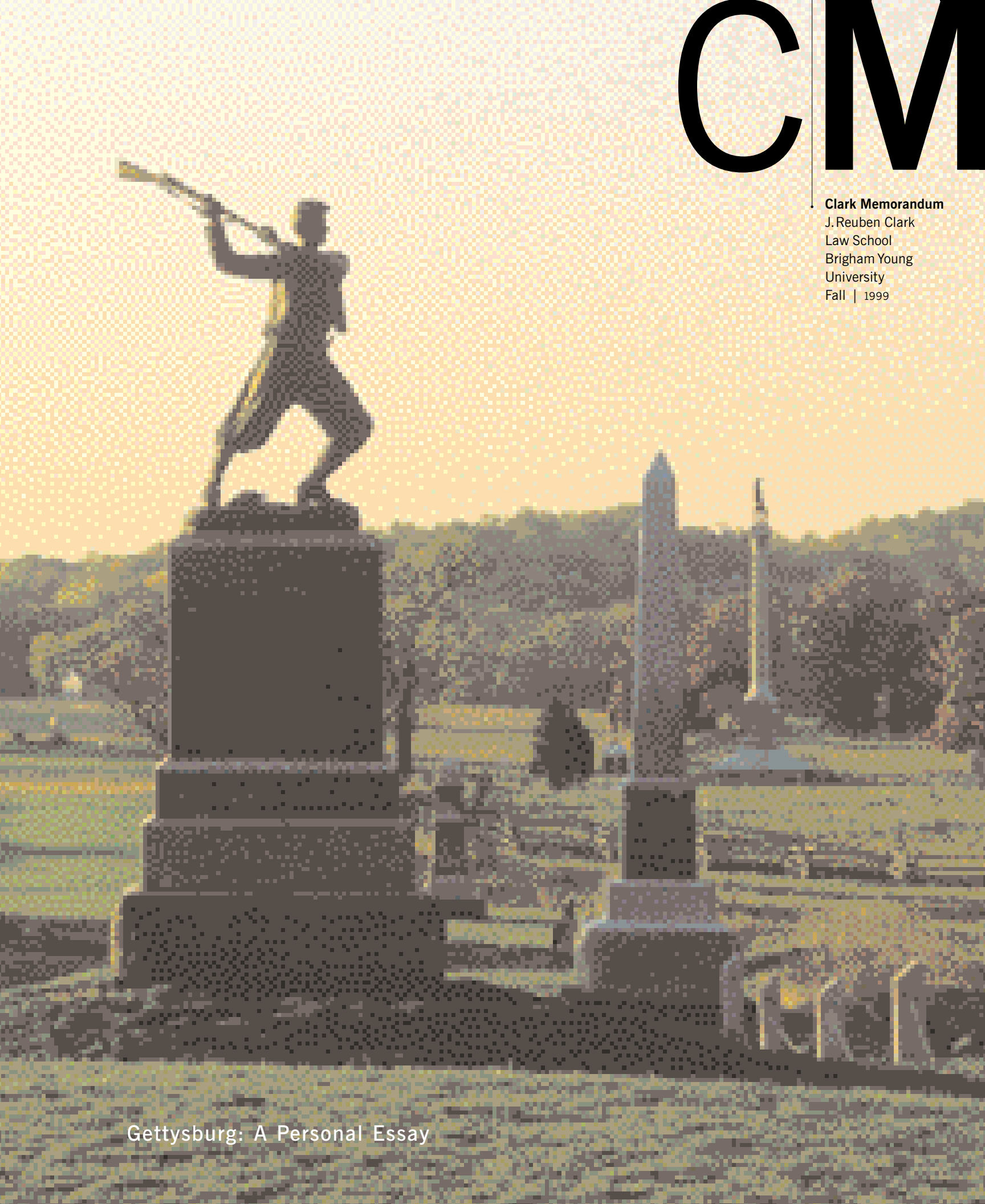
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## Clark Memorandum

J. Reuben Clark  
Law School  
Brigham Young  
University  
Fall | 1999



Gettysburg: A Personal Essay

Cover: Gettysburg  
National Military Park,  
Gettysburg, Pennsylvania.  
*Photograph by John Snyder.*

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Clark Law Society is to promote  
high moral and professional  
standards in the legal profes-  
sion and service to society.  
In fulfilling its mission, the Law  
Society is guided by the phi-  
losophy, personal example, and  
values of its namesake, J. Reuben  
Clark, Jr. Those values include  
(1) public service, (2) loyalty to  
the rule of law as exemplified  
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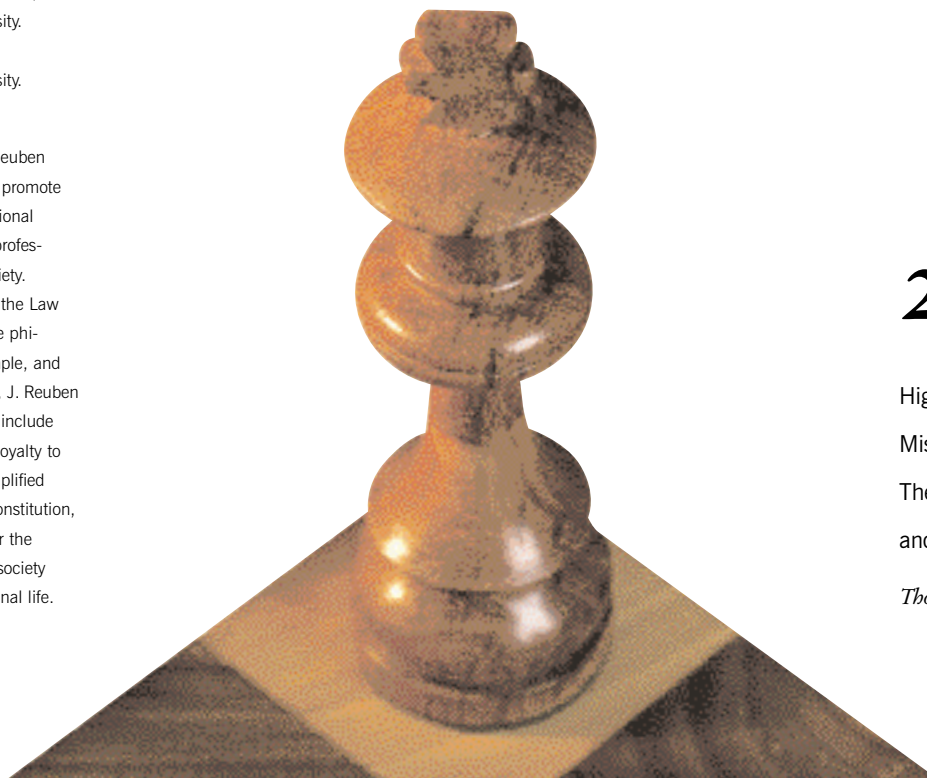
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# Lawyer as Policy Maker

BY REX E. LEE

*The following article is an excerpt from a convocation address given to the  
first graduating class of the J. Reuben Clark Law School on April 23, 1976.*

PHOTO BY JOHN SNYDER

# President

Romney, President Oaks, Dean Hawkins, Judge Wallace, members of the faculty, members of the charter class, ladies and gentlemen: I think you know how honored Janet and I are that you asked us to be with you on this occasion. There are few tributes that could please us as much.

Each class that graduates from this Law School will have a place all its own and will make its own distinctive mark. Clearly, there will never be another class like this one—a fact, I might add, that is a source of some solace and comfort to the members of the faculty. Never again will the quantity or the intensity of effort in recruiting and admitting each individual class member be repeated. Nor, for that matter, will it ever need to be, thanks largely to you and the fact that three years ago you were willing to come and share with us the joys and, at that time, the risks of a new law school.

[A] . . . second thought that I want to leave with you concerns the role of the lawyer as a policy maker. There is no other profession whose members find themselves, as a necessary consequence of the work that they do, so continually involved in important policy-making functions. I believe that for most lawyers this is a plus.

It is equally clear that there are some problems—some of them personal in nature, but more of them institutional. I have no doubt that one of the reasons for the increased interest in law school over the last seven years is that so many law students perceive, and perceive correctly, that law training provides an access to what Dean Hawkins has termed “the levers of power.”

It is, I believe, one of life’s ironies that those who enter the profession for this reason not only miss the broader satisfactions that the practice of law has to offer but also fail to achieve their immediate objective, the exercise of influence, as fully as those who see the broader service aspects of the lawyer’s calling and for whom the exercise of influence is an unsolicited by-product. It is, if you will, another manifestation of the biblical injunction that he who would save his life must lose it.

For some, the role of the lawyer in policy formulation and implementation is direct and predominant. In my view, it is more than coincidence that a disproportionately high percentage of legislators and government administrators come from the members of our profession. I am convinced that the tools that are acquired at a first-rate law school, such as the one that you have attended, qualify the graduate for a direct role in policy formulation and implementation.

But the function of our profession in policy matters is more subtle and of much wider scope than the passage, interpretation, and enforcement of laws. The practicing lawyer who operates in the most traditional lawyering ways—trying lawsuits, drafting contracts, counseling clients—is also a policy maker. Note the choice of verb in the preceding sentence. It is not that he has the opportunity to be a policy maker; he *is* a policy maker. The question is not whether but how well and how consciously. It is on the premise that there is a probable relationship between the consciousness of one’s participation in the lawyer policy-making function and the quality of that participation that I have selected this as one of my four points.

The inevitability of the lawyer as a policy maker is rooted in the unique characteristic of our common law system: the pivotal role of the judge. Under our system, the resolution of disputes among private parties not only results in determining who owes whom how much; it is also an important source of law. Unlike his civilian counterpart, the common law judge is not confined to interpreting what some legislative body probably meant. In addition, he has the power and the duty in appropriate cases to make law where there is no law and to fill in the interstices of legislative judgment where they exist.

This, I submit, is the essence of policy making. And it is not restricted to judges. A foundational premise of our adversary system is that we best approach the determination of truth when the facts and the law supporting each opposing position are marshaled and presented by skilled advocates and then leave the ultimate judgment to a neutral arbiter, whether judge or jury. Necessarily, therefore, the trial lawyer, as

an officer of the court, plays an integral role in the common law judge's policy-making function.

Similarly, the substance of commercial document drafting and client counseling is determined in large part by the lawyer's anticipation of how the courts probably would decide particular issues if called upon to decide them. This necessarily involves the same basic kind of policy formulation, even though on an anticipatory level, that the courts themselves pursue. This anticipatory policy-making process, when undertaken by skilled craftsmen, in turn has an effect on the decisions of the person whose judgment is anticipated, namely the judge.

So I hope that you will enter the profession conscious of your role as a policy

eral system, you begin to develop a feel for the real crisis that currently faces the courts, the place where you will work. Proposals have been advanced, including (1) the identification of certain matters such as probate and divorce that traditionally have been handled by the courts but that might better be solved by simpler and more effective alternative means; (2) exercising some control over the ever-increasing tendency of Congress and state legislatures to impose new burdens on the judiciary without any corresponding increases in judicial resources; and (3) doing away with jury trial in civil cases.

These and other proposals are not without serious costs. Participation in the resolution of these kinds of complex, societal-impacting issues, unlike the policy

the Executive Branch to be subjected to the rack, screw, or any other appropriate torture device. The only quid pro quo is the modest undertaking never to exercise any of the powers conferred by Article I of the Constitution.

Title II provides for the appointment of a special president, chosen from the ranks of living presidents or, if there is none, at random from the Manhattan phone book. The function of the special president will be to review the acts of all ex-presidents and conclude without exception that they were within the public interest.

Title III provides for judicial reform. It would require that all judges' opinions prior to publication be submitted to a board consisting of college freshmen logic students and eighth-grade grammarians.

*There is no other profession whose members find themselves...so continually involved in important policy-making functions. I believe that for most lawyers this is a plus.*

maker. Your entrances come at a time that the profession faces policy issues of great magnitude.

For example, unless some rather bold steps are taken during the course of your professional lifetime, the ability of the American courts to perform their tasks will be seriously jeopardized. An article published last year in the *Stanford Law Review* by Professor John Barton pointed out that if federal appellate cases continue to grow at the same rate as they have grown for the past 10 years, then by the year 2010 the United States Circuit Courts of Appeal will be required to decide over 1,000,000 cases each year, which will require 5,000 appellate judges to make the decisions and 1,000 new volumes of the Federal Reporter to report them.

When you consider that for every case that reaches Judge Wallace's level in our system there are 10 cases that are filed in the federal district courts, and when you consider further that in one state, California, there are four times as many lawsuits filed each year as in the entire fed-

roles necessarily involved in the lawyer's day-to-day work, is largely optional. It is an option that I hope most of you will take.

Now, as long as we are talking of policy, I would particularly invite your attention to a bill that is now in the hatching stage among some of the most thoughtful people in the Department of Justice. This bill has not yet come to the attention of the attorney general, and, in fact, if it did, there would probably be a few replacements. But it promises to be one of the most far-reaching pieces of legislation in the history of our republic. Title I, Section 1, would initiate the process for partial repeal of that provision of Article I of the Constitution that no title of nobility can be granted by the United States. Section 2 of Title I then provides that any person elected to any House of Congress shall have the option of designating himself to any title of nobility of his own choosing, whether duke, earl, marquis, or whatever, together with all the traditional prerequisites of nobility, an annual stipend of \$100,000 for life, and the right once each year to select a representative of

Having perfected only three titles thus far, the architects of this bill are now working on Title IV, which deals with government bureaucrats and still needs some work. Section 1 provides for a resident reasonable man in each department and agency of government. To any first-year law student, the need for such a position is obvious. But since he will function much like an oil filter, he will have to be replaced every six months, and there is a serious problem what to do with him in his clogged-up condition. The most promising suggestions to date have been that he could teach tax or that he could write evidence exams. Section 2 of Title IV requires an embroidered notice to be hung in the office of every government administrator, in letters at least four inches high, stating, "If stupidity is an adequate explanation for what has happened, don't look for any other."

If this bill becomes law, it will obviously solve most of the policy problems facing our nation. If it does not, then you will continue to fill the lawyer's role as policy makers...



I [also] want to discuss the unusual expectations that lawyers and nonlawyers hold concerning the standards of professional conduct to be observed by the members of this class. This involves your relationships with your clients, with your fellow lawyers, and with the community at large.

Of those three groups, the one with which you should be most concerned is your fellow lawyers, because it is they who will be most influential in establishing your reputation for high ethical standards. Whatever the community in which you practice, you will shortly come to an understanding that there are certain members of the bar within that community whose oral assurance is all that you will ever need as a basis for confident reliance. There is no advantage that any lawyer enjoys that compares with that kind of reputation among his brethren at the bar.

In some respects, I think that people are trying too hard to find differences between you and the graduates of other law schools. But with regard to standards of professional conduct, I have no objection to the unusually high expectations of you that I perceive among the members of the profession that you are about to enter. I am convinced that these expectations exist. You should not consider their existence threatening but only supportive of the standards of professional conduct that you should be willing to demonstrate.

Remember that like any great edifice, a lawyer's reputation cannot be quickly built, but it can be quickly destroyed. Remember also that there are enormous opportunities and temptations to trade long-range benefits, including your reputation, for short-term advantages. It is the same kind of trade-off that Jacob proposed to Esau some three millennia past. It was not a good deal then, and it hasn't improved with age.

So I'm hopeful that in your dealings with your fellow lawyers you will always lean a little on the careful side. When those opportunities come, as they surely will, to harvest an advantage in a particular case at the cost of your long-range relationship with your fellow lawyers: Don't do it.



I come now to my final point. In a sense, it is the most important of all in achieving a proper fit of your professional activities within your broader whole existence and interests. It is a subject that we first discussed on that memorable day three years ago when we first met as a class in the Jesse Knight Building. It is a subject that has warranted and has received continual attention, discussion, and dialogue since that time, involving not only you but also your spouses.

The graduation of this class coincides with the centennial of our university and the bicentennial of our nation. I recently finished a novel by James Michener bearing the title *Centennial*. It is a fictional history of a Colorado community and surrounding areas since the beginning of time. A consistent theme that emerges from the events that are the subject of that novel is that at any given time in the development of our country, those who were fortunate enough to be present and participating labored under an assumption that the prevailing way of life and

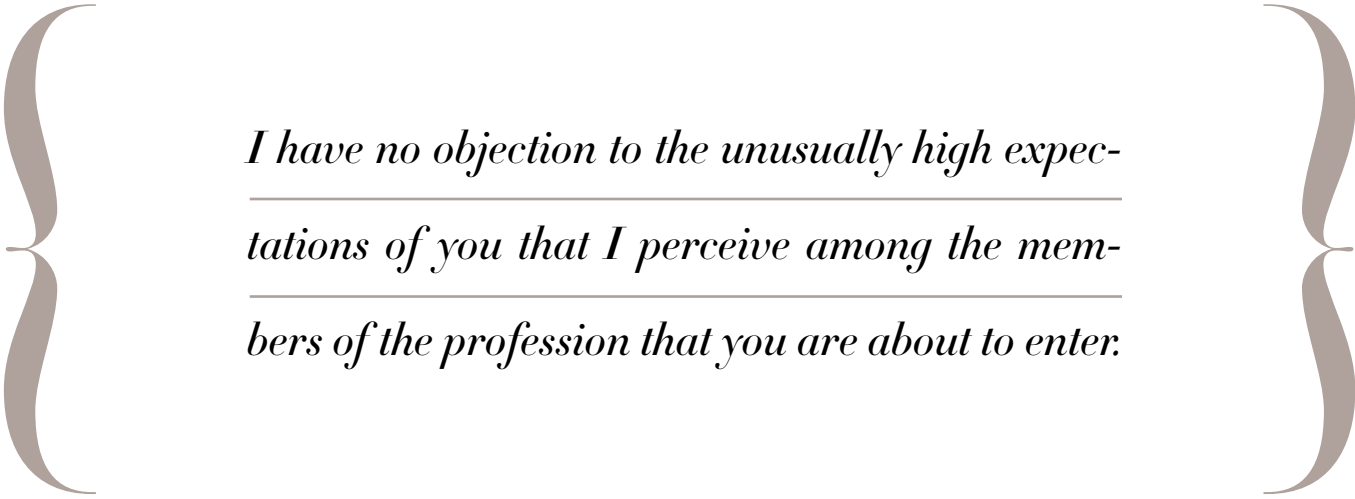
the circumstances that made it possible would last forever.

During the early 19th century, the rivers and streams of the Rocky Mountains abounded with beaver. There were literally millions of them. The trappers and traders who were the only white inhabitants of the area could not conceive of such a vast wilderness ever being useful for anything but a harvest ground for pelts.

A little farther east, and a little later in time, the historic treaty of Fort Laramie in 1851 assumed that the Great Plains would always be inhabited by buffalo. Since the land had no possible utility for any other purpose, the treaty confidently assured that the Great Plains would belong to the Indians for as long as the water flowed and as long as the grass still grew.

The pattern repeated itself as the buffalo gave way to the cattlemen, who in turn saw their great open-range empire broken up by the sod-busting farmer, armed with that curious new invention barbed wire.





*I have no objection to the unusually high expectations of you that I perceive among the members of the profession that you are about to enter.*

The continuing recurrence of the familiar pattern led me to contemplate how rewarding it would have been to have personally witnessed, for example, the annual gathering of the great northern and southern buffalo herds—60 million of them—or to have been present at one of the raucous trader/trapper rendezvous during the early 1800s. Inevitably those who were witnesses to such events would have seen them in a different perspective if they had realized that they were part of our American heritage that would one day reach a stopping point and never be repeated.

But the main function of history is to give some guidance to the present and future, not just to satisfy curiosities about the past. In a very real sense, every case that you will work on as lawyers is unique. The savoring of those experiences need not be retrospective only.

The practice of law can be a much richer experience if at the time that you are working on each of these unique cases you will appreciate it at that time for what it is, for the societal and economic environment in which it arises, and for the contribution that it makes to the community in which you live and to your individual development as a lawyer. That kind of approach reaches beyond the professional experience.

I want to show you a picture. Some of you may remember that little face. I do too. The only place you can see that face today is in a picture. It is true that we still have a Wendy. But she's three and a half years older. Never again will there be opportunities to have and to love this Wendy at this stage of her existence, to share her experiences, and to contribute to her happiness. She's 9 years old now. Pretty soon she'll be 10, and then when she's twice as old as she is now, she probably will be gone from our home. She also has brothers and sisters, and each new day brings a new opportunity for loving, for sharing, for understanding.

I have no greater hope for this class than that you will fully appreciate not only your professional opportunities at the time that they occur but also the individual, personal, and family opportunities.

Now I'm going to say something that I hadn't really planned to say but that I want to be the last words that you hear as a part of your official law school program. A dominant feature of your law school training has been to instruct you in the skills of skepticism. This has been a necessary part of your training as advocates. But I want you to hear one last time from me that although I value those skills as highly as anyone, and though I feel very strongly that the Law School must continue to give that kind of rigorous, intellectual training, there

are absolutes in this world, and just as there is a place for skepticism, there is also a place where skepticism is as inappropriate as it is unnecessary. I have serious doubts concerning the eternal verities of the Rule of Shelley's Case, the doctrine of prior restraint, the law of offer and acceptance, or even, as much as it pains me to say so, the Rule of Reason under the Sherman Act.

But I want you to know, my brothers and sisters, that there are eternal verities. I was not present on the spring day in 1820 when Joseph Smith saw the Father and the Son, nor was I present some nine years later when he and Oliver Cowdery had hands laid upon their heads and the Aaronic Priesthood was restored. But I want you to know with all of the surety of one who was not there at that time that it really happened and that those truths are far more important than anything that you ever learned in Law School, and I leave this with you in the name of Jesus Christ. Amen.

*Appointed founding dean of BYU's new law school in 1971, Rex E. Lee stood at the helm of the J. Reuben Clark Law School for more than 10 years before leaving to serve as solicitor general of the United States. He returned to the university in 1986 to teach constitutional law and in July 1989 was named president of Brigham Young University. A victim of cancer, Lee passed away on March 11, 1996.*



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P R O F E S S I O N A L

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by Carl S. Hawkins

Photo by John Snyder

S E R V I C E   A S   A

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# Christian Ministry

*This address was given to the entering class of the J. Reuben Clark Law School on August 22, 1981.*

We do not enjoy reminders that we are indebted to others, but sometimes reminders help to sharpen our perspective and increase our resolve. That is why I feel it is appropriate to remind you at the beginning of your legal education that you are indebted to the tithe payers of the Church for more than two-thirds of the cost of your legal education. Your own tuition (often paid in part by others) covers less than one-third of the operating costs of the Law School and makes no contribution to the establishment of this building, our library, and other capital resources.

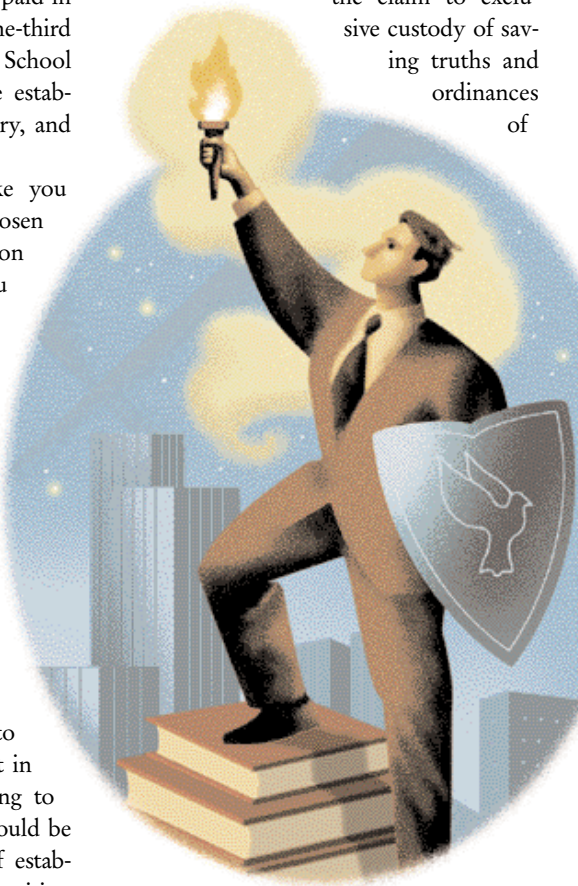
I offer this reminder to make you think about why the Church has chosen to confer such generous benefits upon you. Surely it is not because you have personally inherited or earned some superior right or claim upon the trust funds of the kingdom. Neither is it a good enough reason to suppose that the Church wants only to increase your earning capacity so that you can pay more tithing. Sadly enough, that is about as far as some students seem to get in their thinking about the justification of their educational subsidy. In fact, the future tithing on your increased earning capacity might be enough to repay the Church for its investment in your education. But if we are going to reduce this to bare economics, it would be cheaper for the Church, instead of establishing this law school, to give you tuition grants to attend secular law schools, and it would still get the increased tithing returns on your larger earning capacity as a lawyer.

The Church's reason for subsidizing your preparation for a law career must be based upon some hope that you will get from this school something more than passage into an affluent profession. It must be based upon a hope that you will acquire here not only the necessary legal knowledge and professional skills, but also a commitment to using them not selfishly, but in the service of others. In that belief, I invite you to begin thinking about your law career as an opportunity for a Christian ministry through professional service. This high perspective will not be

easy for you to acquire or to maintain. There will be many obstacles.

First, the attempt to idealize your profession as a Christian ministry may appear to conflict with theological disapproval of "paid ministries." Pretensions to a ministry in a paid profession may even suggest the evils of "priestcraft," condemned so often in the Book of Mormon. But priestcraft is

the claim to exclusive custody of saving truths and ordinances of



the gospel and the pretense of power to dispense them for personal gain. If we make no pretense of selling salvation, there is no priestcraft in accepting pay for professional services anymore than accepting pay for any honest hard work. And if we perform the service with our whole soul, skillfully, and as a witness of our love for God, it can become a kind of ministry to those we serve.

Another difficulty with viewing professional service as a Christian ministry is the irony that it may be easier for active Mormons to segment their lives and to satisfy their religious aspirations in formal church callings. You may feel content to say, "My mission was two years ago in

Germany," or "My ministry is my calling as a Relief Society teacher." This may satisfy your need to feel that you are a religious person without having to worry about how your religion applies in the rest of your life. If so, you are deluding yourself.

When the Lord commands that we love him with all of our heart, might, mind, and strength, he is not concerned so much with the intensity of our feelings as with the breadth and completeness of our commitment. For the committed Christian, every part of his or her being must become a living witness of love for Christ. Your life must become your ministry. Your roles as husband or wife, parent, friend, church worker, student, and lawyer must all become missions within that ministry, and your whole person, including your religious values, must become engaged in every part of that ministry.

Some of us who have taught at other law schools have observed that Christian law students from other churches who do not have our opportunities to serve in formal church callings unless they become professional ministers seem to feel more than we do the need to pour their religious fervor into their professional calling and to make that their witness for Christ. We should feel the same need no less, even though we have other callings from time to time to serve in other ways.

Another obstacle to viewing law school as preparation for a service ministry will be the daily grind of law school itself. Many of you will have to work harder than you ever have before. There will be stress and anxiety caused by having to learn new ways of thinking, aggravated by a lack of adequate feedback on how you are doing. Your sense of security and, for some of you, even your sense of worth may be threatened temporarily as you seem to be competing in faster company than ever before. And very little that goes on from day to day in the classroom will remind you of the higher aspirations of a Christian ministry. Most of your learning efforts will be spent on acquiring secular knowledge of the law and developing the lawyer's tough-minded skills of analysis and advocacy.

You will have to keep in mind that such knowledge and skills are indispensable preparation for an effective life of professional service, even if they are not enough to fulfill your higher aspirations. Your preparation at this law school will be no less rigorous than at other good law schools. That sometimes disappoints some of our students, who seem to expect that, because this is a Church-sponsored school, and because they are religious persons, their professional development should come easier by some special dispensation without having to work for it, or else they suppose that their religious beliefs will somehow make them superior lawyers without having to acquire all of the tedious knowledge and hard skills that are required of less pious lawyers. That is, of course, a perversion of our religious beliefs.

The Lord has never promised to give us knowledge or skill without effort and pain,

ity that a lawyer can be professionally effective and still be a morally good person. That process of reconciliation should begin now, with the first day of law school, even if it cannot be completed here.

You can start with the reassurance that the General Authorities of the Church believe that it is possible to be both an effective lawyer and a devout Christian. That is why they have given you J. Reuben Clark, Jr., as a model. Unfortunately, most of your generation know of President Clark only dimly as a great Church leader, counselor to Presidents Heber J. Grant, George Albert Smith, and David O. McKay. But for 27 years before he became a Church official, J. Reuben Clark was a successful, powerful, and prestigious lawyer in government service, in private practice, and in the service of great corporations in Washington, D.C., and on Wall Street. Surely the message implied by

ethics for lawyers is a serious and worthwhile part of your legal education. Professional ethics will lift your standards above the daily mores of commerce and politics, but they cannot be substituted for your Christian aspirations, if you want to be at peace with yourself.

That is why I invite you to begin now upon the higher path of reconciliation, to prepare for the legal profession as Christian ministry. It will be a lifetime process and a highly personal one, for which you must accept individual responsibility. It has to happen within you. We cannot inject it into you. We may be able to help you a little. We are concerned that we may not have tried to help enough. We are resolved to try harder. For those who wish to try it, the Professional Seminar, offered for the first time this year, will provide an intimate forum for explicit discussion of these very concerns.

*You cannot aspire to law as a Christian ministry until you are at least tentatively reconciled to the possibility that a lawyer can be professionally effective and still be a morally good person.*

and the ninth section of the Doctrine and Covenants states explicitly that in seeking to understand a matter, we must first work it out for ourselves. This is not to suggest that spiritual insights have no place in your legal education, but only to remind you that your secular knowledge of the law must be acquired by the same grinding process that applies to everyone else, and only after that may you expect to receive occasional spiritual insights into the higher significance of what you have learned.

Many of you will have difficulty viewing law as a Christian ministry because you harbor ambiguous feelings about the moral character of lawyers. From our larger culture, you have absorbed mixed impressions or images of lawyers as persons of power and prestige and as defenders of sacred rights, on the one hand, and as aggressive manipulators, hired guns, defenders of the guilty, protectors of wealth and special privilege, and moral equivocators, on the other hand. Certainly you cannot aspire to law as a Christian ministry until you are at least tentatively reconciled to the possibil-

establishing this law school in his honor is not that a lawyer can become a good person only by abandoning the legal profession for full-time church service. The message must be that J. Reuben Clark was a good Christian while he was an effective lawyer in the professional service of his country and his private clients. I urge you to begin studying that model by reading Frank Fox's superb biography *J. Reuben Clark: The Public Years*.

There are two paths you can travel in seeking to accommodate your professional calling and your religious beliefs. One is the path of delusion and segmentation; the other is the path of reconciliation and integration. The path of reconciliation is the harder way, but it is the truthful way. The easy way is the delusion that you can separate your Christian aspirations from that part of yourself that is engaged in earning a living. It is easier because you can then let the secular world define your professional role for you, and you can limit your professional aspirations by the ethics of role. The study of professional

For those of you who are not Mormons, I hope these remarks about religion and profession will not cause you to feel any less welcome. We recognize that your ideals and aspirations can be just as high as ours. I hope you will interpret my remarks as urging you to make your professional career a ministry in the service of your highest ideals and aspirations. Please feel free to share your beliefs with us. You will make our education richer by doing that, which is part of why we have invited you here.

And for all of you, I hope this somber message has not dampened your enthusiasm for the adventure that you are about to begin. Learning to become lawyers can be exciting and stimulating. It can even be fun. So let's get on with it.

*In May 1972, Carl S. Hawkins, then a professor at University of Michigan Law School, accepted a faculty position with the new BYU Law School. He succeeded Rex E. Lee—his persistent recruiter—as the second dean of the J. Reuben Clark Law School, serving from 1981 to 1985.*



# Professionalism

BY BRUCE C. HAFEN

**T**he announced subject of my remarks is something about Law School activities. The handout you have received tells you most of what you need to know on that subject in an immediate and practical sense. What the handout does not say, however, is that the purpose of everything we do in this law school, formally and informally, is to make of you an attorney and counselor at law, a lawyer, a member of the bar, part of a learned and noble profession. Whether you come to understand the special meaning of those titles is a matter for your own discovery.

You will not learn merely from reading cases that special combination of skill, insight, and selflessness that work together to create a truly professional counselor at law. But I daresay that if you do not make this discovery, really as a by-product of what we do in the classroom, you will leave this campus three years hence not much more than a relatively sophisticated money grubber and may always wonder why all that lofty language about being a professional seems so full of emptiness.

What does it mean, that word “professional”? Oh, it might mean playing football for money instead of for fun. Or maybe it means competently executed, a “professional” job, something done by a real pro. You may wonder if the word differs in any material sense from “trade” or “occupation.” Some will tell you it means joining up with the establishment, the guardians of the existing power structure.

I must confess that the word did not mean much to me when I graduated from law school or even when I practiced. But just lately, for some reason, some concepts filled with meaning—intellectual, social, and spiritual—have come to my mind in association with the word “professional.”

*The following speech was  
given to the entering class  
of the J. Reuben Clark Law  
School on August 30, 1973.*

I think it began when I was giving an oral examination to an Honors Program student who was planning to enter medical school. I wanted to ask some question that would probe the range of his mind in connection with his vocational choice, but I did not know much about medicine. I believe I finally put the question this way: “The law protects as privileged—that is, not admissible as evidence in a court of law—the confidential communications between a lawyer and his client, a priest and a penitent, and a doctor and his patient. What do these three roles, lawyer, priest, and physician, have in common that justifies this important legal privilege?”

His brow furrowed, a few beads of sweat appeared. Finally, he ventured, “Well, they all go to school a long time and at least the doctors and lawyers make a lot of money.” “Not

all of them,” I replied. That was all he said. But I continued to think about it.

Then I noticed in some reading I was doing for another purpose (though I’m sure I was aware of it before) that these three were the first, and for many years the only, fields of higher education, the oldest, the most traditional of all *learned* endeavors in western civilization. Much later, the scholar—the university teacher and researcher—was added by some to this list. However, in recent years many occupations, from salesmen to hobos, have claimed an interest in the status imputed by that word “profession.”

Just lately, I ran across a brilliant little analysis by a sociologist named Goode of whether “the big three” or “big four,” depending on a minor distinction or two, will or should ever be displaced as the central professions. You will be relieved to know that Goode doesn’t think any of the other fields will make it, but more important than his conclusion is his explanation of what it is that makes the traditional professions unique.

Some of the characteristics that distinguish a true profession are the following. (I will be using Goode as a point of depar-





ture but do not blame him for what follows.)

(1) Members of the profession have mastered an abstract body of erudite knowledge that can and does solve complex and highly personal problems.

(2) The knowledge and skills involved are sufficiently difficult that they are not accessible to the ordinary man, by his own efforts or even with help. Thus, only other professionals in the same field can judge the competence of their fellows.

(3) The practitioner rather than the client determines the client's needs.

(4) The profession demands real sacrifice from practitioners both ideally and in fact.

(5) The problems with which the profession deals are so sensitive and so important that incompetence within the profession is highly dangerous, both to the individual client and to society.

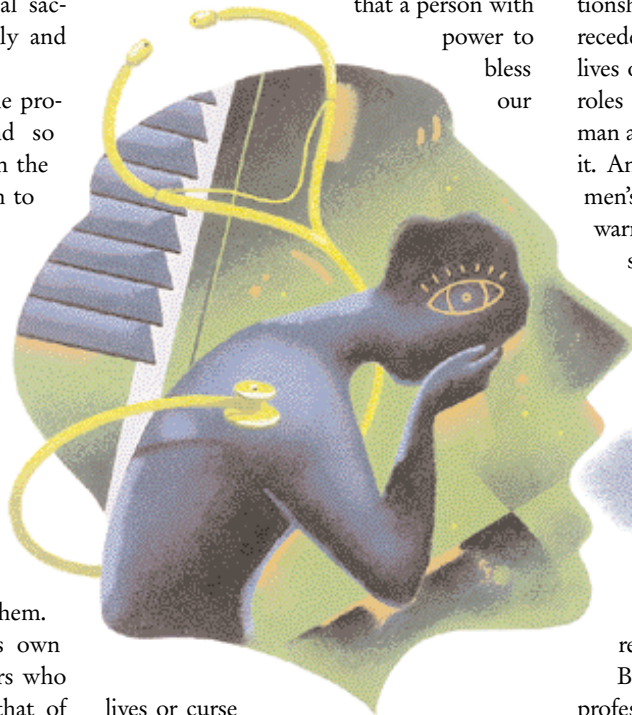
(6) As a result of the kinds of facts just mentioned, the lay society has no alternative but to trust the professional, even to the extent of laying bare to him its most intimate and threatening fears in a complete leap of faith, thereby entrusting the professional not only with confidential facts but also with enough power and control over their lives that he can truly bless or tragically exploit them.

(7) If the professional puts his own self-interest or the interests of others who would exploit his position above that of the client, he not only should not but actually cannot perform the task he is engaged to perform. Thus, the very nature of the needs he is supposed to meet *requires* trust, devotion to selfless ideals, and objectivity. If those elements do not characterize the professional relationship, he is not really a professional at all, and he is not in fact performing the function recognized over the last several centuries as indispensable. The function he *is* performing, on the other hand, is quite dispensable.

In another interesting treatise on the role of the major professions in American history (Calhoun, *Professional Lives in America*, 1965), it is noted that one fundamental question has been the source of society's anxiety about the role of the

learned professions. That question is, "Their interest or God's?" In other words, people have traditionally believed that the allegiance of professionals was to God, or in more recent years, at least to higher values and principles than their own self-interest. But because of the absolute necessity, if problems are to be solved, of entrusting professionals with total power to deal as they will with sensitive personal matters as well as with the resources of society, people have always been, to use a modern phrase, a little antsy about what professionals will do with that power. Whenever it appears

that a person with power to bless our



lives or curse them might really be motivated by something other than our best interests, we panic, and instinctively want to take back that grant of trust that has left us so vulnerable. Once the trust is gone, we keep from professionals what they must have to perform their intended task—our secrets.

Let me take you back now, for a moment, to the question I posed to the Honors student. Shortly after that interview, I asked another Honors student informally how he might have answered that question. His response was more provocative. "What do the lawyer, doctor, and priest have in common?" he repeated. "I think they are all *healers*, those to whom we open up our innermost secrets when

something seems to threaten our very lives, physically, spiritually, or in some other way that would destroy our liberty or our property, our chance to live. And we go to them to be healed, to be made whole, and to retain control over our lives."

That student and I have since discussed the possibility that in ancient times the healer, the source of justice and life of both body and spirit, was God and those who actually represented him. The complete dependence of men upon God to bring about justice or maintain the quality of life was a true reflection of man's natural relationship to Him. But when God gradually receded from apparent participation in the lives of most men, as they supposed, those roles still had to be filled. The nature of man and his most crucial problems required it. And thus, the other healers arose, and men's faith in them continued, sometimes warranted, sometimes unwarranted. My student friend believes it was because

of the ancient power of the true priesthood that the lawyers and judges, the scholars, and the other holders of power, political and otherwise, assumed the tradition of wearing robes, in an imitation of the priesthood robes that had originally symbolized the authority and power of the great healer. I leave that possibility for your continued reflection.

But my commentary on the learned professions is not complete, because in recent times the citadel of status and power represented by the professionals has been under heavy assault as society increasingly sees that citadel as a symbol of money and self-interest, rather than actual service. Let me quote another recent study of professional life in America.

The professions justify themselves as organized efforts to assure that society's vital needs are met: the need for justice, for health, for knowledge, for spiritual guidance, for communication, for governance, for the creation and maintenance of a physical environment, for the socially responsible provision of goods and services.

But over the past 10 years, we are forced to recognize that something is

amiss. Vital needs are unmet, and the organized professions seem perversely or arrogantly opposed to change. Vast increases in funding for medicine, education, law, and welfare have been accompanied by declines in service to those most in need.

The young have learned this lesson almost too well. Five years ago Paul Goodman taught a course titled "Professionalism" at the New School for Social Research in New York City. Goodman brought in professionals to explain "the obstacles that stood in the way of honest practice, and their own life experiences in circumventing them." These professionals were rejected by the students, who called them "liars, finks, mystifiers, or deluded." Goodman realized that the students "did not believe in the existence of real professions at all; professions were concepts of repressive society

I, too, am a professional. I have felt the inner tug and pull of my interests against those of a client. I have seen some of the hypocrisy to which reference has been made. But my view of the solution to such dilemmas differs from those I have mentioned. The reforms may be quite right these days, that the healers and others to whom we have entrusted our power have not always proven worthy of that trust, not only in highly visible places but at the grassroots level as well. However, that does not change the facts established by the ages.

The needs of men for the healing power have not vanished. But if the needs go unmet, if the healers do not heal, I say, that is because of the hearts of the healers, not because of the transitory social fabric of our day. Oh, it is true, if the custodians of life and liberty and justice have turned

about three or four. She longed for their attention after supper but found them invariably reading the newspaper for what must have seemed like an awfully long time. Soon she gave up on breaking through the newsprint wall and began trying to read the discarded pages herself, since it seemed to be so interesting. But she couldn't, try as she would.

Then she noticed that both her grandfather and her grandmother were wearing glasses. Aha, she thought, that is how they make sense of all those letters and numbers. So she went to Grandma with the sincere request, "Grandma, could I borrow your glasses so I can read the paper, too?"

Ladies and gentlemen, the power is not in the glasses. It is not in the robes or the titles or the credentials. It is in the man or the woman who has somehow

*What do the lawyer, doctor, and priest have in common? We go to them to be healed, to be made whole, and to retain control over our lives.*

(Ronald Gross and Paul Osterman, eds., *The New Professionals*, [1965], pg. 10).

Therefore, this study reports, there has been increasing agitation to "replace the unresponsive hierarchies that now exist to serve entrenched interests with new, humane professions that really serve their clients, particularly the poor" (Id. at 13, quoting Joseph Featherstone, *Schools Where Children Learn*, [1971], p. x). The twin goals of those who actively lead such movements are, "first, to transform the institutions of society (rather than merely augment or support their word), and secondly, to liberate, rather than merely to help, the oppressed and the poor" (Id. at 17). Note that the advocates of this position believe that "the most important insight of recent years [is] that political organization is not enough, that civil society and culture must be reconstructed" (Id. at 25-26), in order to achieve the reforms they believe are needed.

their power to bless into a power to curse, then that social fabric of which we speak may just come all unraveled. But the symbol of the robes remains as the symbol of the healing power. There is no such power in the symbols of destruction and anarchy, and changes in environment simply do not change men's hearts.

The real question for you, for me, and for all who assume the responsibility of the professional tradition is whether we really do prove worthy of the trust. Can our hearts be changed enough that it really is a selfless interest we serve? I happen to believe they can. And also by a leap of faith, this law school has committed itself to the proposition that they *will*, not by force or pedantic incantations, but by your private discoveries, borne of righteous desires.

May I close with a homespun little story. I am told that my sister was visiting her grandparents years ago, when she was

attuned his or her life to the sources of the true healing power, thereby himself becoming a *source* of the power, as the branches on a vine. That can be done, and is done, quite independently of religious affiliations or theological frameworks, as demonstrated by the stirring examples of the true professional whose names and writings you will soon begin to encounter in the great books and cases of the law.

May you discover and give yourself to the same secrets that they did, not only because your life will thus become more rich, but, more important, because you as a counselor of the law may thus make a profound difference in the lives of the people and the society whom you aspire one day to serve.

*Bruce Hafen was dean of the J. Reuben Clark Law School from 1985 to 1989. He currently is serving as a member of the First Quorum of Seventy.*



by H. Reese Hansen

It is a pleasure to formally welcome you to the Law School. You are the 27th entering class of the J. Reuben Clark Law School, the last to be admitted in the 20th century. I congratulate you for being admitted and for your decision to attend law school here. I am grateful that you are here.

I love the first day of school. I always have, and it may be that the excitement I have always felt when school starts each fall contributed to my decision to be a teacher. I still remember vividly, even after 30 years, when I was where you

# Special Obligation

are today. I was a young father with three children, from a little farm and railroad town in the northernmost reaches of Utah nobody ever heard of, unsure of anything about law school, but I wanted to become a lawyer. Because I had been out of college for five years, I was a bit older than all but one or two in my class, and I didn't know a single person there.

In the next weeks I became sure of one thing about law school: every single living, breathing human being in my class was at least twice as smart as I was. But out of those three years were forged some of the choicest friendships of my life. It will be that way for you too.

I want to talk today a bit about the responsibility that runs with the opportunity to study law at BYU.

One of the most difficult things we do is to select from the large pool of applicants those who will be extended the invitation to come here to law school. We feel a special kind of stewardship using the resources made available to us by the board of trustees. Although our law school tuition totals several thousand dollars each year, each one of you is receiving, in essence, a scholarship worth more than \$15,000 per year. That \$15,000-plus is the difference between your tuition payment and what it is costing each year for your

*The following address was presented  
to the entering class of the J. Reuben  
Clark Law School on August 16, 1999.*

PHOTO BY JOHN SNYDER



education at the Law School. The \$15,000 is paid primarily by appropriations to the university from tithing funds of the Church. Another large portion comes from the financial contributions of our alumni and donors. I believe it is fair to say that there is no law school in the country, public or private, where the students are as generously supported as you are.

For every one of you who is here this morning, there are five qualified students who have hoped and prayed with their families that they could study law at BYU but who could not be admitted. I think these facts mean that you and I have a special kind of obligation while we are here to strive in every way to make our law school the very best that it can be, both in the intellectual rigor of our courses and in the moral and ethical environment in which we conduct ourselves.

Almost all of you are here because you want to practice law. Today you begin the real work of becoming lawyers. I can promise you that you will be challenged in law study. The study of law is different from the kind of study you are familiar with from undergraduate school. In law school you will be disciplined to learn not just what the rules of law are but, more important, to understand why the rules are what they are. Because in so many cases it is not possible to be certain which rules of law will govern a particular situation, it is only by thoroughly understanding the rationale of relevant rules that you can be equipped to responsibly counsel clients about the probable legal outcome of anticipated actions or existing disputes. It is the ability to recognize which rules may be relevant and how those rules will affect a unique circumstance that makes legal education distinctive.

The ability to understand why things *are as they are* is greatly aided by coming to really see and appreciate how persons with different perspectives see them. Your class is made up of people who come from many walks of life, from all over the country and the world. You are surrounded by a group of people who have been carefully selected to bring together persons of uncommon intellectual ability who also have life experiences and cultural backgrounds that will enrich your legal education in important

ways. The value of diversity among fellow students is perhaps greater in legal education than in any other course of study.

Because to study law is to study the regulation of human interaction, a knowledge of the different mind-sets, world views, ethnic groups, tribes, religions, and genders that make up the global family of man is essential to your education. The diversity of your individual experiences and back-



*The value of  
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other course of study.*

grounds provides the opportunity for you to open up new windows and vantage points from which to see the tapestry of life.

Our sincere hope is that each of you will enter into dialogue with your colleagues in an honest effort to listen to others with the same willingness to understand their truths and make them yours that you wish for them to give your own. If you will do that, your life will be enriched and blessed, and you will be a blessing to others.

Each of you is well equipped to be successful in law study. Based upon your academic achievements, your class easily ranks in the smartest 20 entering law classes in the country this year. I want to assure you that you will succeed here if you are willing to do the work.

Because law study is so different, and because it is hard work, many of you will become impatient with the process. A few of you may decide that the effort required to philosophically integrate required knowledge with disciplined reasoning skills is simply too great and will look for shortcuts to the answer. Those who seek shortcuts miss the intellectual fun of law school and substantially waste their time and their ability and shortchange themselves in preparing to become lawyers. Someone else's work cannot possibly provide you with the tools you will need to become effective lawyers.

While you are here, you will quickly see that the faculty will expect the very best you can give. This is not a place where you will learn some version of LDS law in a Sunday School-like setting. President James E. Faust taught this to law students recently when he said, "Do not expect your professor . . . to concentrate [your] lessons out of the scriptures. [Your teacher's] obligation is to teach you the secular rules of law and related matters. The whisperings of the Holy Spirit will no doubt help you, but you must learn the rules of law, using Churchill's phrase, by 'blood, sweat, and tears.' Just having a good heart will not get the job done."

You owe it to yourself, your family, other supporters, and to your future clients to do everything you can do in the next three years to become technically competent as a lawyer. The process of becoming truly competent does not accommodate the expedience of shortcuts.

I cannot talk about your becoming lawyers without speaking about the matter of ethics and integrity. All of the lawyer jokes notwithstanding, a lawyer's integrity is the bedrock foundation of successful lawyering. Ethics and integrity are the most fundamental tenet of professionalism.

As you will come to know, every member of the legal profession is subject to the Code of Professional Conduct, which provides express guidance and limitations on lawyer behavior. It seems to



me, therefore, that your commitment and full compliance with the BYU Honor Code is a worthy step in your becoming the kind of men and women who can be trusted by clients, courts, and fellow attorneys. James Monroe said, "The question to be asked at the end of an educational step is not what has the student learned, but what has the student become."

I suggest that each of you rereads the BYU Honor Code, which you are pledged to keep. Some requirements of the Honor Code may seem unimportant or irrelevant, even silly, i.e., length of hair, style of clothes, and we acknowledge that the subject of these standards of personal appearance is not nearly as important as the standards related to honesty, chastity, and respecting others' personal and property rights that are also parts of the Honor Code. I hope you will review and seriously ponder those parts in which you have committed

1. to act with graciousness and consideration for others;
2. to be honest in *all* behavior. This includes not cheating, plagiarizing, or knowingly giving false information;
3. to respect the personal rights of others—not physically or verbally abusing any person—not obstructing or disrupting the study of others;
4. to respect the property rights of others and to obey, honor, and sustain the law.

Our institutional response with regard to the Honor Code will depend upon the nature of the violation. But your personal obligation, sealed by the strength of your personal promise, is to keep them all. Our expectation is that you will keep your word.

Your personal honesty is your most important professional credential. In the press of too busy lives and the pressure to perform, some of you will be tempted to take shortcuts that violate rules of ordinary courtesy, decency, and honesty. These pressures, which you are almost certain to feel in law school, will be greater than you have experienced yet in any other part of your life and are common in the legal profession.

It is important that as you undertake the study of law, you are more vigilant than ever before in guarding your integrity against the temptations to "succeed at any cost." Real deadlines with real conse-

quences are the common reality in the practice of law. In law practice, papers have to be filed on time, deals have to be completed by certain dates, commitments have to be kept, or cases and fortunes can be lost. Because this is so, lawyers have to learn to factor personal interruptions and emergencies into their schedules so that deadlines can be kept. It is going to be that way in law school, too.

Please hear this: It is vitally important that you plan ahead and perform your plan in a timely way so that you will not put yourself in a position of facing the temptation to perform on time by stealing another person's ideas or work. Sadly, almost every year we have to deal with cases of plagiarism and other forms of academic dishonesty. These cases are almost always the product of an over-scheduled life or failure to discipline oneself to do the work when it needs to be done—or both. The rationalization process usually runs something like this: "I could do the work if I just had the time; I don't have time, but it is not my fault; no one will know; this paper is just not all that important in the scheme of my legal education, let alone my whole life; and no one is going to be hurt."

Academic professional shortcuts involving the theft of another's work are unacceptable here or at any other law school and will result in serious academic discipline. Acts of dishonesty by lawyers result in professional discipline, even disbarment. Your brothers and sisters of the bar simply have no tolerance for dishonesty in any of its forms. Neither do we, and neither should you.

As you pursue your legal education, my deepest hope is that you will never abandon the teachings of integrity and kindness that you received in your homes. One of the embarrassments I suffer is illustrated by complaints I have fielded from an occasional shopkeeper or landlord, ticket agent, or clerk in the registration office or other office, of a law student who has ignored common courtesy and invoked his or her supposed understanding of the law and flexed a newly formed legal muscle, to take unfair advantage or insist upon a supposed right. It is often said that the boorish behavior of first-year law students has ruined more Thanksgiving Day family dinners than any other single factor.

Please remember in your dealings with each other, indeed with everyone you see, to exemplify civility and grace.

There will be temptation, sometimes considerable temptation, with the anxiety about performance and class standing, to try to outrun everybody in the class at any cost. President Faust warned:

*There is a great risk in justifying what we do individually and professionally on the basis of what is "legal" rather than what is "right." In so doing, we put our very souls at risk. The philosophy that what is "legal" is also "right" will rob us of what is highest and best in our nature. What conduct is actually "legal" is, in many instances, way below the standards of a civilized society and light years below the teaching of the Christ. If you accept what is "legal" as your standard of personal or professional conduct, you will rob yourself of that which is truly noble in your personal dignity and worth. You can be just as tough as you want as an advocate, but you must never, never lower your own integrity.*

It is, therefore, critically important while you are in law school and thereafter that as you search for knowledge, you also seek wisdom; as you obtain the power to reason, you also strive for compassion; as you strive to succeed, you embrace morality; as you seek justice, you demonstrate mercy.

As you enter the profession, seek to serve its highest purpose: to help others realize their best potential. The most important role of a lawyer is to help and heal. Please remember in your dealings with each other, indeed with everyone you see, to exemplify civility, grace, and integrity. In the end, your self-worth will not be measured by your law school grade point average or class standing, by your beginning salary, or the total of your lifetime earnings or by how soon you become a partner. Self-worth is measured by the manner in which you have served others.

We welcome you as colleagues in the legal profession. We are proud to have you be a part of the BYU Law School. We are as anxious to get started as you are. May God bless our united efforts to become the best in all ways that we can be.

*H. Reese Hansen has served as dean of the J. Reuben Clark Law School since 1990.*



GETTYSBURG



A

PERSONAL



ESSAY

OF MATTHEW REINHOLDT & PHOTOS BY JOHN GUTTER

# You see the pictures,

the Mathew Brady pictures of the bodies of Antietam and Bull Run, and the soldiers' clothes are always open like someone rifled them looking for loose change. The story tells itself. A man lies with his left arm twisted behind him and his head to the side. His shirt is open; he opened it himself when he realized what had knocked him down. He tore the buttons to see: was it just an arm or leg? He could live without an arm or a leg.

In the picture the man's eyes are wide. His face is toward the camera, his mouth open. He seems to be saying something to the photographer. A man can't always tell when he's been killed. In this case it is *not* an arm or leg; in the picture you can see that it is the man's chest that is dark.

My first year, I asked the other science teacher how it was he had come to teach high school. He had been a geologist and an on-site consultant to drilling companies in Brazil and the U.S. (very dangerous work, a sort of war between rock and machine. For 20 years he had said "do this" or "stop doing that," and men's lives had depended on what he said. He had made more money each year than a teacher makes in three. Then he took a while off to relax; someone asked him to teach a couple of classes to kids, and he never went back.

This is about wounds to the gut and to the head and to the heart. What we can live without and what we can't.

I had been hired to teach the life sciences, but they needed someone to fill in for eighth-grade U.S. history at least for one year, and I figured, why not? "Don't worry," someone told me. "The whole secret to teaching eighth grade is to seem to have known all your life what you learned this morning." The other secret, I learned, was to tell stories—not the stories students expect to hear, neat and rife with patriotic meaning, nor the too-easy exposés that have become popular. I mean the stories that leave them wondering: The rainy night a graying Washington put on his glasses and brought his men to tears; the locket Chief Justice John Marshall wore around his neck after his wife died—stories I still haven't recovered from.

In the first summer after our marriage I talked my wife into a trip back east. We said good-bye to our students, packed up our car, and drove off to see the places I'd been telling stories about. We swung south through Texas and Louisiana, stopped at Vicksburg and Atlanta, and turned north. I'm not the kind of Civil War buff who would dress up for reenactments, but I will admit that in Atlanta I heard "Dixie" and got hot behind the eyes.

In Richmond I bought a cavalry saber, and in Fredericksburg I stood behind the stone wall on Marye's Heights and looked down a city road toward the river, trying to measure it in my mind. It was June, but I imagined the field under snow, without the cars and houses—just a wide gentle slope down to the town, and behind the town, the Rappahannock River. Up slope of the wall, 30 thousand rebels wait three deep for the next round of the slaughter. Again the bugle sounds, and blue boys surge forward. This time it is the 1st Corps, and you can just make out the black hats of the Iron Brigade. They walk shoulder to shoulder at a good pace, rifles up and bayonets glinting like some kind of bad joke (as if any of them are going to get that close to the wall). Up on the hill a solid mile of artillery pieces reload. Some of the Union men have left behind their packs, because what's the point? Some have no canteens. Would it make any difference if they left their guns? I try to walk this field in my mind, but I don't make it very far. I start again.

"Are you coming?" says my wife. She is already moving along the wall, heading for the parking lot. "It's late," she says. Ours is the last car.

This is the first real trip Danielle and I have taken. We turn north on the highway and ride in silence. Opposing traffic has thinned to a few trucks humming by on their way to Richmond, their lights ablaze. She turns on the overhead light

and thumbs through our AAA guide for a campground. She turns off the light. She does not search for a radio station or make conversation. It is enough to be alone with the names on signs: Frederick . . . Harper's Ferry . . . Potomac. How does one get ready for Gettysburg? What did Lincoln do on that last night? On the back of the map I start scribbling notes.

"It'll be like a business trip," I told Danielle back in April. "To make us better teachers." Now as I lie awake in the tent listening to the Virginia rain, a lesson plan is trying to take shape in my head: "Let me tell you what I did for the summer. Let me tell you about Gettysburg."

Tell them *what* about Gettysburg?

With a standard Enfield rifle, a decent shot could hit a man square in the chest eight out of 10 times from 100 yards away. The ninth time might be an accidental evisceration, and the 10th time he might miss completely (and kill the kid behind you). But that's assuming he's taking time to aim and is not in the heat of battle. Maybe I could pace off 100 yards and have a student stand there. Maybe I could line up 10 of them.

About breakfast time we cross into Pennsylvania. Danielle wakes and looks out at the passing fields, then closes her eyes again. She has wonderful eyes, even closed. We are on the Chambersburg Pike, or where it used to be, hurrying into Gettysburg from the west on the heels of Longstreet's 1st Corps. Mist lies heavy on the Pennsylvania cornfields.

Danielle wakes again. "I'm hungry," she says, but not to complain or to make me stop. Just a statement, the way a sweetheart might have said it in a letter two weeks overdue: "I'm lonely. I'm alone." And he would know, squatting in the mud, leaning over the paper to keep it dry—he would

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④ **Photo on page 20: The "Angle" at Gettysburg stretches back into time.**



☺ **The view west from Little Round Top looks down at Devils Den and Seminary Ridge, once Confederate strongholds.**

**A memorial stone to the 20th Maine stands on Little Round Top. ☺**

know what she had *not* written and why—because some things we *can* live without.

We've been driving since before sunup, and I know I should stop, but I'm not hungry. More than that (something I can't explain), I want to fast. It's almost noon. Danielle does not mention food again. This is not the first time I've watched myself be cruel. "I'm sorry," I want to tell her. "I didn't mean to drag you into this. I wasn't thinking." But of course I *was* thinking—just not about her. I stop. We try the shoofly pie just to see what we've missed. In an hour we're back on the road.

They were hot, Longstreet's Corps (a week's march in the summer sun), and half of them shoeless. They were still 10 miles out, though all morning they had heard the cannons up ahead, and it made them sick. Their fellows were up there in the thick of it, and here they were late! They moved quickly up the pike, the morning sun just starting to burn off the fog. One man drank from a canteen as he walked and passed it to another. They did not look at each other.

There's something I haven't told Danielle. Maybe I won't go back to teach-

ing. In Richmond, standing in John Marshall's dining room, an idea spoke to me: law school. Voices call that way sometimes. I almost told her what I was thinking—that I might quit work, take out loans, and go back to school—but I couldn't work out a satisfactory answer to the question she would surely ask: why?

My mind is a muddled and irritating mess. I felt it at Williamsburg, walking across campus at William and Mary, and I feel it now as the day wears on and signs for the battlefield start cropping up. I don't know what law school does to a person, but so many of my heroes have passed that way.

It's after six when we drive into the town. The tours and visitors center are closed, but it's the field I want to see. On the horizon is a thickly wooded hill and then another, lower and with fewer trees. "That looks like the Round Tops," I say, and as soon as we step out into the trees, I know where we are. Off to the left is a



gully. "That's the notch where the Alabama men came up." No one is listening. Danielle has wandered up the hill, and I follow. Over there is where the 20th Maine piled rocks in the last minutes before the storm. Their wall comes up almost to the knees. On the stones someone has left a row of tied flowers, soggy with the rain. It reminds me of the tree in Salt Lake City where the woman saw the image of Mary. People leave things there: notes, coins, locks of hair.

When a row of rifles discharge, they say, the noise is so loud you cannot tell if your own gun fired. But it's not the battle itself I think about. It's the time before the shooting starts, when you can still hear



men breathing on your right and on your left. Behind you someone is saying a prayer, and you wish you'd thought of that. You think of your gun, the weapon in your hand. Is it ready? You can't remember loading. You load again, just to be sure.

They found a gun in Antietam with eight rounds in the barrel, one on top of another, unfired.

The hill is steeper than it looks. By the time I get near the top, I'm breathing hard. There is a stone here on the south face of Little Round Top with the names of Colonel Chamberlain and his 20th Maine. Chamberlain was a teacher, a college professor, before and after the war. He asked his school for leave to go fight, and when they denied it he went on sabbatical and joined up anyway. He was tall, long-legged, and he was there to walk up that slope at Fredericksburg. He was shot down with the others, pinned to the ground by flying lead. That night he pulled two corpses over him to keep from freezing. A third body he used for a pillow. Six months later he stood with what was left of the 20th Maine and waited, on this spot, for the rebel army.

Their names are listed on the stone. Of the original thousand, barely 200 made it this far, plus a 100 or so reinforcements. That was the head count *before* Gettysburg, before their position was charged over and over by Confederate forces three times their size. When the last charge came, the 20th Maine was down to 178 men and no ammunition, so they fixed their bayonets and charged. I understand now what would make a man leave his shoes on the grave of a saint and walk home barefoot.

There is a story from Mormon history of three boys who walked through freezing water to carry a handcart train over a river. At their funerals, Brigham Young said that that one noble act alone had assured those boys a place in the kingdom of God.

It was the first day's fighting that set up the second. You have one day to take or not take that hill, and when the sun goes down, you know where the next day's fighting will be and who will have to pay for it. What Chamberlain did here on that second day set up the third day, and the third day set up the rest of the war. But from the rock where I'm sitting, I can see that it didn't start or end here in



Gettysburg or even with what the books call our Civil War. I think only one war is all there's ever been, and of all the men and regiments of men, of all the divisions and corps and battalions who raced to this spot from Frederick and Hagerstown and from the west, I won't be the last.

I have been a long time coming, and I'm a little late for the fight, perhaps. Perhaps not.

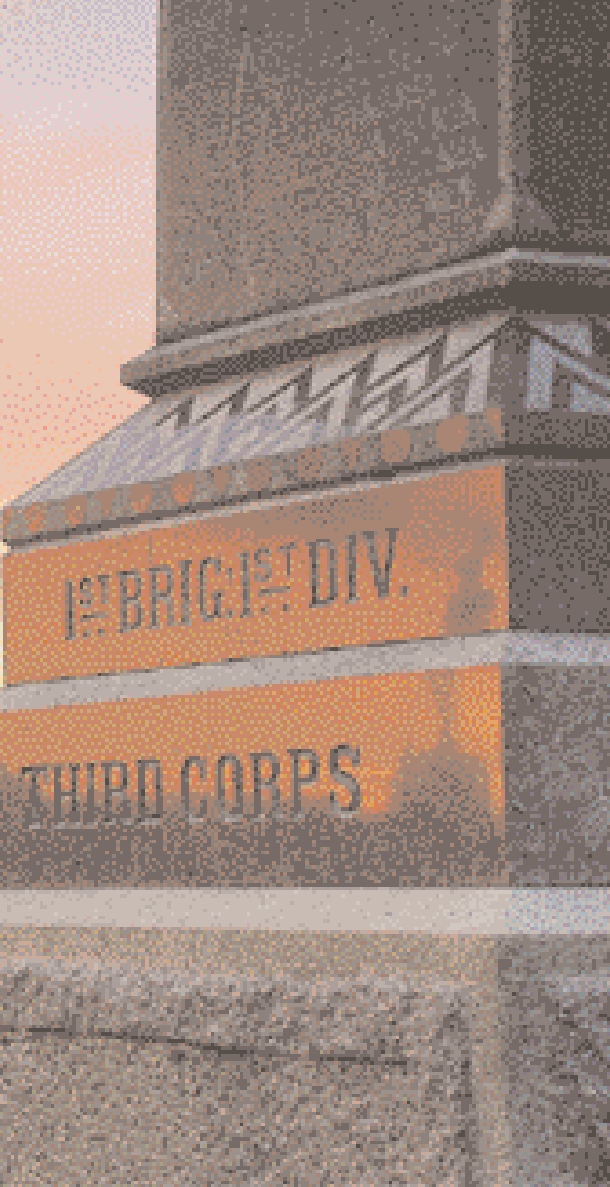
The rain has let up a little. Danielle has wandered down into Devil's Den. I can

see her moving between the boulders. In my pocket I have a Kleenex and five bucks for breakfast. If I had paper, maybe I could write a poem or something. I could leave my watch, the watch Danielle gave me. But in the rain it would stop telling time.

There's my wallet and credit cards. But what do dead men want with credit cards? I have a pocketknife—and lint. A woman in those days sat at home making lint so someone would have something to stuff the hole in her husband.

I have a wedding ring. I have a finger. I could live without a finger. Slice it right here on the stone. I try to do it in my mind—one quick motion with the knife. One of my students has a dad who was in Vietnam. I saw him one day make a motion with a knife. He was trimming a nail, I guess, but I thought it was something else and thought, "You crazy bugger! Who do you think wants to clean that up?"





⊙ **A monument near the Peach Orchard cuts the view looking west to Seminary Ridge.**

What good is a sacrifice no one asked for? I rise to go. How will it sound when I tell them I had nothing, *nothing* worth putting on the altar? From up here I can see Cemetery Ridge, the Seminary, and Devil's Den. I can see my wife coming up the hill, picking her way between the stones.

In the morning we do the tourist thing, but when we are tired of the shops and plastic soldiers and the statue in front of where Lincoln slept, we go back out to the field. We go to the Angle. It is still early. I lean on the fence and look out over that mile stretch. There are people out there in the gray drizzle moving about, taking their own sweet time, looking for all the world like they're dressing the line. I throw out

the lesson in my head and start over. How will I give them Gettysburg? Foolish, I know, to try. Impossible not to. I will go back to the gift shop. I will buy a couple of minié balls and grapeshot. "This is grape," I will tell them. "Feel it. Heft it. At 100 yards you can pour a bucket of this down a barrel and you've got yourself a giant shotgun. Or if you're running low on shot, you can use canister with nails or screws or rocks. Or horseshoes." But in a warm, quiet room, what will they care what canister can do to a man's spine? I'm aiming for the chest, and the best I'll do is knick a few of them.

Right here, behind this wooden fence, is where they sent what was left of Chamberlain's regiment. They sat right here making jokes, because people who know they shouldn't have survived can find almost anything funny. They were in the middle of the Union army now, where Meade thought they might get some rest. It was July 3. The cannonade began. Over in that grove of trees a mile away Pickett's men were waiting their turn, and Pickett was waiting for Longstreet—Longstreet the romantic, who wrote day after day to his Louisa. He sat over there behind those trees astride a log fence all morning, listening to the guns. He was adding it up—how many men and how far they would get. Oh, he knew what he was doing, don't doubt it. Even a madman can do arithmetic. Lee knew what he was doing. Lincoln knew when he stood up and made something degenerate into something right, even if he pretended not to. How does a mind like Longstreet's work? How did he write a letter that would make a wife rock for hours, and while she was back home rocking, nod his head and give the order for 10 thousand men to die?

Jackson and Lincoln and Sherman and Lee. James Longstreet. I look at them and I think, people can do without sleep and comfort and family and friends; they can live without love or tenderness; they don't even need to understand or be understood. They can live without almost anything.

It's the "almost" that has me puzzled.

The men stepped out of the trees. No more hymns, no more prayers. They stepped out in a line a mile long, and the whole Union army gasped. Then they cheered. From way down in their chests,

they cheered like boys, because they understood and knew, suddenly, it was not *their* day to die. They laughed when they saw how easy it would be, laughing and cheering with their mouths wide open and not ashamed.

Maybe I will tell this story to another class next year. I will tell them how you nodded, General Longstreet, and I will show them how your friend led the men all the way to the Union guns with his hat on the end of his sword. They will take from it one thing, and I will take another. When they are asked what they learned about in school, they will say "heroes" or "hatred" or "love"—but I am sure this story is not about love. Men killed and let themselves be killed. They took the one thing that mattered most to their sweethearts and children and marched right into the cannons. No, it wasn't about love, unless love is something deeper and far more dangerous than I can explain.

In the only photograph taken of the Gettysburg Address, the president is a blur. The photographer was setting up his camera, making all his adjustments, and before he had taken a single shot, the speech was over. The president was sitting down! He went ahead and snapped one anyway, and if you look carefully you will see Lincoln's head is the only thing moving.

Among the rows and rows of bodies in the cornfield at Antietam was a young man named Oliver Holmes. To the day he died, the critics of Justice Holmes said his views of law were too much tainted by his experience as a soldier, that the war had left him permanently scarred—and maybe it had. I see him flat on his back in a Maryland cornfield, pawing through his own clothes for the wound.

I loved teaching, but maybe I will not go back. "A man can live greatly in the law as well as elsewhere," Holmes said. "There as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable." It's not that I relish the thought of being sent to the front. I just want to have something worth giving before I die.

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**ON FEBRUARY 12, 1999,** *the United States Senate voted not to convict President William Jefferson Clinton of two articles of impeachment passed against him in the House of Representatives. The first article alleged that President Clinton was guilty of perjury before a federal grand jury convened as part of the independent counsel's investigation of the president's conduct. The second alleged that President Clinton was guilty of obstruction of justice. The impeachment proceedings in the House and Senate sparked a national dialogue about the Constitution, the use of legalisms, and the role of the media and of personal investigation of public figures. While the Senate's vote effectively concluded those proceedings, it did not bring closure to the national debate about these important issues.*

**BY THOMAS R. LEE<sup>1</sup>**

*photography by john snyder*



**HALL OF CRIMINALS  
& MISDEMEANORS?  
THE CLINTON IMPEACHMENT AND THE CONSTITUTION**



In an attempt to facilitate a further airing of the public debate of the issues presented by the Clinton impeachment proceedings and Senate trial, the Brigham Young University Chapter of the Federalist Society sponsored a discussion by a panel of four of the prominent players in the proceedings. The panel, convened at Brigham Young University's J. Reuben Clark Law School on April 2, 1999, consisted of four individuals who performed frontline roles in the Clinton trial: Senator Robert Bennett of Utah, who sat in judgment of the president during the Senate trial; Congressman Chris Cannon of Utah, who prosecuted the president as one of the House managers in the Senate trial; Attorney Gregory Craig, who was retained as special White House impeachment counsel shortly before the House impeached the president and who headed up the president's defense team during the Senate trial; and Senate Legal Counsel Thomas Griffith, who helped moderate and establish the trial procedures used by the Senate in the impeachment trial.

Excerpts from a transcript of the panel discussion accompany this article (see sidebar). The full transcript is published in the December 1999 issue of *BYU Law Review*. The transcript includes discussion of several issues that divided legal scholars throughout the impeachment trial and continue to do so today, including the following: (1) the proper scope of the impeachable offenses set forth in the Constitution; (2) whether the standard for impeachable offenses by the president should be parallel to the standard for impeachable offenses by federal judges; (3) the constitutionality of alternatives to impeachment, such as censure; and (4) the role that partisanship should play in the impeachment process.

This article introduces the legal issues addressed by the panel and offers a brief description of the state of current legal scholarship on these questions with an eye toward providing context for evaluation of the contribution of the panel discussion.

#### **IMPEACHABLE OFFENSES**

Article II, Section 4, of the Constitution provides that "[t]he President, Vice President, and all civil officers of the United States shall be removed from Office on Impeachment for and conviction of

Treason, Bribery, or other High Crimes and Misdemeanors." Much of the debate surrounding the Clinton impeachment centered on the proper scope of the offenses described in this provision, particularly on the intent of the phrase "other high crimes and misdemeanors." Various interpretive approaches were expressed during the course of the Clinton impeachment proceedings. Some constitutional scholars relied primarily on original intent and history as a guide to interpreting impeachment clause language, while others cited pragmatic political concerns or relied on the plain language of the Constitution.

#### *The Impeachment Clause and the Convention Debates*

Some of those who looked to the Constitutional Convention for guidance suggested that the Convention debates indicated a sharply limited notion of impeachment—one that was confined to abuses of "public trust" or of the "executive power," such as procuring office by unlawful means or using presidential authority for ends that are treasonous.<sup>2</sup> Under this view, the language of Article II, Section 4, is seen as a "compromise" between two competing extremes: one that would have permitted impeachment for any conduct amounting to "mal-practice, or neglect of duty,"<sup>3</sup> and another that would have provided that the president "ought not to be impeachable whilst in office."<sup>4</sup>

This view seemed to garner a great deal of support during the Clinton impeachment proceedings. Thirteen constitutional law scholars asserted in a House committee hearing that because President Clinton's conduct did not violate public trust, his actions did not rise to the level of "high crimes and misdemeanors." These scholars acknowledged that perjury and obstruction of justice might rise to that level, but argued that President Clinton's did not because his actions did not involve the "derelict exercise of executive powers."<sup>5</sup>

Similarly, during the time that the committee was deliberating over the report of the independent counsel, four hundred historians issued a public statement in which they argued that the president's conduct did not rise to the level of an impeachable offense, because the Constitution contem-

plates impeachment only "for high crimes and misdemeanors in the exercise of executive power."<sup>6</sup> In the view of these historians, President Clinton's conduct was not impeachable because it involved merely private conduct, not the exercise of executive power. The "grave and momentous step" of impeachment, under this view, requires proof of abuse of executive power, lest the president be permitted to serve only "during pleasure of the Senate."<sup>7</sup>

Others looking at the Constitutional Convention concluded that "as finally adopted, the standard of 'high Crimes and Misdemeanors' seems to have a broader, less restricted meaning than merely a narrow interpretation of crimes against the government."<sup>8</sup> In support of this view, one scholar noted that an earlier draft of the impeachment clause providing for impeachment for "high crimes and misdemeanors *against the United States*" was dropped in favor of what would become the version that today appears in the Constitution—a version that omits the italicized qualifying language.<sup>9</sup> This change in the language of the impeachment clause was seen as indicating "the general sense of the convention that impeachment was intended to reach political abuses, such as maladministration or malversation, as well as indictable crimes," and as also "undermining the claim that impeachment is limited only to what one might call official duties and does not reach what Joseph Story would later call simply 'personal misconduct.'"<sup>10</sup>

In other words, in the view of some scholars, the decision to strike the language permitting impeachment for "maladministration" clearly revealed the Framers' discomfort with a subjective standard that would invite the use of impeachment as an expression of disagreement over public policy matters. It did not, however, rule out the possibility that the Framers had authorized impeachment "on the basis of serious objective misconduct that bears on the official's fitness for office,"<sup>11</sup> even where that misconduct did not stem from a misuse of executive power.

#### *Impeachment Under English Law*

Proponents of the view that "high crimes and misdemeanors" implied some abuse of executive power also relied on the



understanding of that phrase in founding-era England. Several scholars concluded that the term “high crimes and misdemeanors” under English law was generally understood to represent “a category of political crimes against the state.”<sup>12</sup> Under this view, the English practice of impeachment leading up to the founding era suggests that impeachable conduct included “the kind of misconduct that someone could engage in only by virtue of holding public office,” such as unlawful use of public funds, preventing a political enemy from standing for election, or stopping writs of appeal.<sup>13</sup> Put differently, the 18th-century use of the word “high” describes a crime aimed at the sovereign, not at a private person.<sup>14</sup> Thus, Coke distinguished “high” treason from “petit” treason in that the former was “against the sovereign,” and Blackstone defined other “high” offenses as those committed “against the king and government.”<sup>15</sup>

Other commentators challenged this narrow depiction of English practice. In one scholar’s view, English history demonstrates that the phrase “high crimes and misdemeanors” “was a term of art that was not limited to a fixed set of crimes under positive law or the common law of general criminal offenses.”<sup>16</sup> Rather, English practice preserved “a wide discretion to indict officials for bad acts that made them no longer fit to serve and thus a potential danger to the kingdom.”<sup>17</sup> Although warning of the hazard of the inference that the Framers intended a wholesale constitutionalization of the entire history English impeachment, at least one of the president’s defenders acknowledged that the sword of impeachment was frequently treated as a “political weapon” in the hands of the House of Commons in its battles with kings and other officials.<sup>18</sup>

### *Impeachment and “Plain Language”*

Although the text of the impeachment clause itself “does not answer every question” regarding the nature and extent of constitutionally impeachable offenses, proponents of a restrictive standard argued that the constitutional language was at least “highly suggestive.”<sup>19</sup> The “plain language” argument offered by several commentators stemmed from the *ejusdem generis* canon of construction, which dictates that terms in a

## Selected Excerpts from a Transcript\* of a Panel Discussion Sponsored by the Federalist Society

**PROFESSOR LEE:** Mr. Craig, my first question is for you. How should we interpret Article II, Section 4, of the Constitution, which provides that the president shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors? Talk about your interpretive methodology for coming up with a construction of this provision, and talk also, if you would, about the precedent that is added by the Clinton impeachment proceedings to interpretation of the provision.

**MR. CRAIG:** [This is] not a new question. . . . To me this was one of the genuinely most interesting intellectual, historical, legal, and constitutional issues. Taking this set of facts and these allegations about this president and his conduct, and assuming that [they’re] true (which you do in a summary judgment motion kind of proceeding or a demurrer kind of proceeding), [it just] doesn’t rise to the level of an impeachable offense. We had historians testify. We had constitutional scholars, and I know that the House Judiciary Committee was up to here with opinions, expert and nonexpert, legal, historical, on this issue. But to me it was genuinely interesting debate, largely because the consequences to the future were great, if in fact, as I view the case, this conduct, as blameworthy and as wrong and as disappointing as it was, became the basis for removing a president of the United States. In my view, it would have spelled a remarkable lowering of the threshold for an impeachment and made it possible to contemplate the use of impeachment as a political tool—a normal political tool—and weapon in normal political debate in the future, which would have significant consequences for the strength of the presidency.

One of the reasons I took this job and went to work for the president in connection with this case is because I did believe that the presidency and the strength of the presidency as an institution is one of the great things about the history of this country. To undermine it and destroy it in any way, shape, or form would be disastrous. It would have happened with future presidents from other parties had we not had the outcome. As it is, I think the outcome was the right outcome, obviously, and I don’t think the damage to the presidency constitutionally had occurred that I worry about. There has been other damage that I readily acknowledge, particularly in connection with the privilege and with the president’s ability to work with his associates and have the trust of his employees and cabinet.

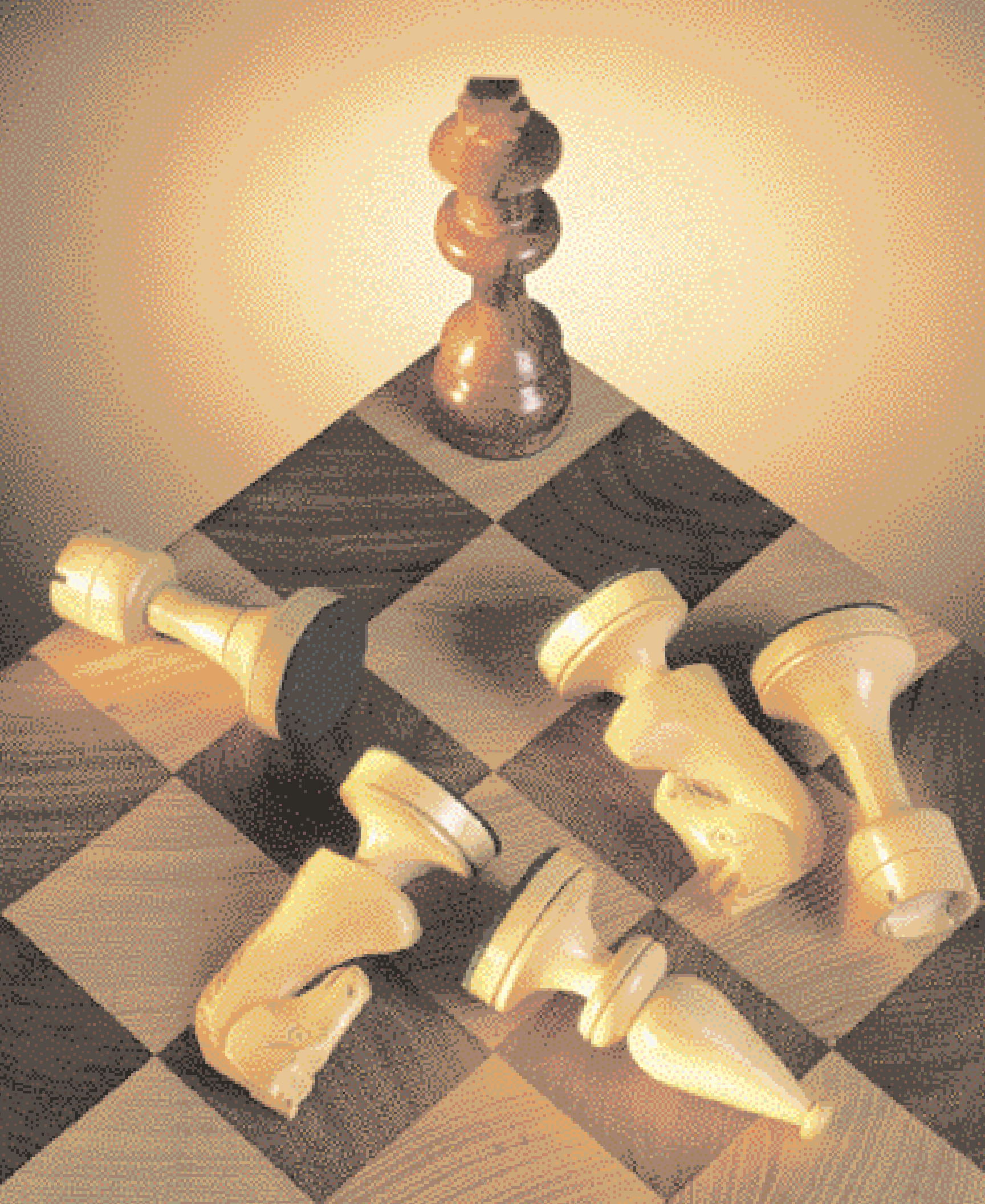
**PROFESSOR LEE:** What’s the standard? In particular, can you focus on what was sometimes focused on by the president’s lawyers, which was, “This is purely private conduct. This doesn’t involve the powers of the president.”

**MR. CRAIG:** I agree with Senator Bumpers’ view on this that the impeachment power was intended to address abuses of official power and threats to the system of government, assaults on our system of government, on our constitutional framework. If you did not have a president abusing his powers as president—directing the FBI to do this, directing the CIA to do that or the IRS to do that, or bribing officials or using his people to bribe officials—then I don’t think you have the kind of conduct that was intended to be addressed by the impeachment power.

**SENATOR BENNETT:** Let me just respond to that. Interestingly enough, it was Senator Bumpers’ speech that ultimately nailed down my decision to vote to convict on obstruction of justice. It demonstrates you are focusing on the president’s conduct as the White House lawyers did primarily, with respect to Monica Lewinsky. I put that aside very quickly and focused on his conduct as president and his actions as president. Senator Bumpers used a phrase that I used in my speech that struck me very vigorously. He said, “The Constitution was written to keep bullies from running over weak people.” I asked myself, who is the bully, and who are the weak people? Of course, the president structured it that he was the victim and that Kenneth Starr was the bully. Our constitutional duty was to protect him from the bully of the independent counsel.

As I viewed it, looking at the case in its total context . . . as a senator, not as a juror. Jurors are restricted to judging the evidence presented in the court. The Founding Fathers recognized that the impeachment process is a safety valve whereby the four-year term given to a president can be abrogated if in fact you get a president who is, in Charles Ruff’s phrase, “threatening the liberties of the people.” The president did not misuse the FBI. The president did not misuse the CIA. He did not do the kind of things Richard Nixon was accused of, but he misused Sidney Blumenthal. He misused James Carville. He misused the enormous public relations that the modern presidency has to deny one of the weak people her day in court or her right to accurate testimony in a case. The systematic demonizing of Paula Jones over her hair and her nose and her choice of attorneys that went on relentlessly was, for me, ultimately a major part of this case. And the fact that he lied under oath in an effort to accomplish this, and he did some of the other things he did, and the House managers talked about it—by the way,







list should be construed to be “of the same kind” as the other terms whose company they keep. Because the terms “treason” and “bribery” commonly implicate the misuse of office, these scholars contended that the Framers must have contemplated the abuse of public power as a predicate to impeachment—that the “other high crimes and misdemeanors” sustaining impeachment must amount to a misuse of public office.<sup>20</sup>

While accepting the *ejusdem generis* premise of this argument, opponents of the restrictive construction of the impeachment clause argued that treason and bribery are not necessarily limited to official misconduct.<sup>21</sup> Because a president could attempt to bribe a federal judge in seeking biased treatment in a private, civil case and could commit treason outside the scope of his official power, the distinction between public and private conduct arguably is not supported by the language of the Constitution.<sup>22</sup> A parallel argument noted that both treason and bribery involve “a betrayal of virtue and a refusal to exercise disinterested judgment” in advancing the public interest and asserted that the impeachment standard should extend by analogy to any acts that raise “grave doubts” about the president’s “honesty, his virtue, or his honor.”<sup>23</sup>

### *Impeachment and Policy*

Despite (or perhaps in light of) the competing arguments set forth above, commentators on both sides of the issue recognized that the evidence of the original and textual understanding of high crimes and misdemeanors could not provide a definitive, objective list of all impeachable offenses. To some, the ambiguity in the applicable standard sustained Gerald Ford’s (in)famous capitulation—that “an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.”<sup>24</sup> Most, however, were unwilling to suspend further analysis in favor of unfettered political discretion.

Thus, while fixing a universal, objective definition may be an impossible task, many scholars asserted that it seems even more ludicrous to suggest that the phrase “high crimes and misdemeanors” means nothing. Indeed, one commentator went even further in concluding that the oath

I agree that the House managers overreached and damaged their case with some of the facts they tried to get us to swallow—nonetheless, the totality of the whole thing, at the end of Dale Bumpers’ speech, I said “Dale has framed it very well.” The Constitution is to keep bullies from running over weak people, and in this case, Bill Clinton, James Carville, and all the other people associated with him, using the enormous powers of the modern presidency, were the bullies, and in my view, that threatens the liberties of the people, and that’s why I voted to convict.

**CONGRESSMAN CANNON:** Let me add just a couple of things to that. . . . [T]oday more poignantly difficult for us as Americans is that you had a secretary of state stand on the portico of the White House and proclaim the innocence of the president. Then after three threats of bombing Serbia left us no position, . . . that we need to send in ground troops. If that becomes necessary, that’s something we ought to do, because the credibility of America is at stake here. It really comes back to how this president has used his staff around him and how their role has changed from defense of a president doing things that even Mr. Craig has said were improper and wrong to an invasion of another country and war, where credibility is terrifically important. . . .

**MR. GRIFFITH:** You [Mr. Craig] didn’t answer Professor Lee’s question. I think that the most honest answer . . . is that we cannot define from the text of the Constitution what “high crimes and misdemeanors” means. The debate went on during the Nixon impeachment. It was continued here at a very high level, but I think the fair answer is we don’t know what it meant. You could look at the history of the debate to the extent that we have it from Madison’s notes from the summer of 1787, it isn’t clear. The original proposal was that impeachment be for treason and bribery. There was a sense that that was too narrow; it didn’t include enough.

The next proposal was that it be expanded to include maladministration. Madison pointed out that if you can remove a president from office from maladministration, he’ll serve only during the tenure of the pleasure of the Senate. That was too broad. So in response to that proposal, George Mason came up with the language “other high crimes and misdemeanors,” and everyone said, “Oh yeah. That solves it.” Well, it didn’t solve it.

The next step in the process was a term of art borrowed from British parliamentary procedure, so the game is you go back to British parliamentary procedure, and the answer is it’s all over the board as to what it means. But we do have in the two hundred years since the Constitution seven instances since the Senate has determined what it thinks high crimes and misdemeanors mean. The Senate has not made the distinction that Mr. Craig and the president’s lawyers tried to impress upon the Senate between private and public conduct. What that means, that’s for the Senate to decide. Remember, it’s an easy job. They get to decide who is right.

I think it is instructive that in the seven convictions that took place in the last two hundred years, that distinction was not made. Now, here is a distinction; however, those were judges. Does it make a difference when you’re talking about removing the president from office? I think it’s a close call. I think it’s interesting to note that the Constitution does not, in Article 2, distinguish between judges and presidents in terms of high crimes and misdemeanors.

On the other hand, the Senate has distinguished between that. Not clearly, but in all removal of judges, language was used that leads you to reserve that perhaps the senators were relying on something other than high crimes and misdemeanors and removal from office. I think the point is, the text isn’t clear. The precedent is more helpful to the president’s detractors than it was to his defenders.

**QUESTION FROM THE AUDIENCE:** You mentioned the significance of the articles of censure. I’ve been curious ever since those were brought up about their basis within the Constitution. I wonder if you could articulate that for us.

**MR. CRAIG:** They seemed to be highly debated in the House, and I didn’t understand why it was highly debated in the House, because there were those who argued, and I think actually one of the congressmen from Connecticut, Christopher Shays, who actually voted not to impeach the president, was most intensely opposed to the idea of passing a resolution of censure, because there’s no provision in the Constitution that seems to apply to it.

There was the concern that it might be viewed as a violation of the prohibition against the articles of attainders that specify punishment for a specific individual. Under the rules of both the House and the Senate, both bodies, whether acting alone or together through joint resolutions or concurrent resolutions or Senate resolutions or House resolutions, can express their views on any subject, whether it’s the fitness of Joe McCarthy to carry out his duties as the chairman or the senator from Wisconsin, or whether it’s to wish Harry Truman a happy birthday after he’s retired. There is nothing to prevent the House or the Senate, working together or acting alone, from formally expressing its views as to the president’s conduct. That was what we thought a resolution of censure meant.

In fact, as I understand it, three or four members of the House Democratic Judiciary Committee had drafted a very, very tough resolution of censure that was used heavily against the president in favor of his removal on the floor of the Senate. It seems to me that if there was a public rebuke that was required, given our view



of the evidence and our view of the Constitution, the public rebuke that was most appropriate was something along these lines—a statement of condemnation—and a moral rebuke of the president. It could have been negotiated if there was anything that was going to be requested of the president in terms of his action. If he had to pay a fine, that could have been discussed. If he had to sign it, that could have been also negotiated. As it was, the proposed resolution of censure that was offered in the House and voted on in the Judiciary Committee and rejected by a party-line vote and the proposed resolution of censure that Senator Bennett and Senator Feinstein had worked on relentlessly, and I think with good intentions, didn't have an opportunity in either the Senate or the House to find a vote and give the members of both bodies an opportunity to express their views on this. I think that was the appropriate way of resolving this.

**SENATOR BENNETT:** [O]n a constitutional basis I agree. I think it's within the powers of the Senate and the House, and if I had been in the House—and Chris and I would probably have had words on this—I would have voted to allow a censure motion in the House. I disagree that any such motion could carry with it any kind of penalty. If there had been a fine connected with it, in my opinion that's a bill of attainder, and so I would have fought the purely political cover kind of censure motion that was coming in. I kept saying to my colleagues when I was working on censure in the Senate, do not misunderstand. In my view, this is not an alternative to voting on conviction.

We have a constitutional duty to hold this trial and to bring it to closure, as Chris has said, one way or the other. We have to have a vote up or down, and I will not support any kind of effort to give us an alternative to that vote. If that vote is not sufficient to remove the president, my motivation is that I do not want history to look back on this and say, "This was Andrew Johnson. This was a purely partisan situation, and therefore it can be ignored." While nobody pays any attention to me, I take opportunities like this to point out this fact. There were 50 votes to remove the president. There were 33 cosponsors on the censure motion that Senator Feinstein and I crafted of those who did not vote to remove the president. If you add those who were willing to condemn his behavior in very strong terms to those who thought that behavior rose to the level of removal, you have formally on the record 83 senators who, one way or the other, have said that this president's activities have been despicable. That's what I hope my grandchildren get taught when they read the history of this case. That's what I was interested in establishing as a historical record, after the fact, with respect to what this was all about.

**MR. GRIFFITH:** One of the things that was most surprising to me in working with Democratic senators during the impeachment proceeding was to find out how badly they wanted a censure motion. It was very genuine. Some people would say that's for political cover, but I think it was a lot more than that. It was genuine outrage at the president's conduct and a real desire to go on record to condemn it. I think we understand the political reasons why that didn't happen. I think we just ran out of time. I think if February 12 was the drop-dead deadline, everyone would be over it by then.

**SENATOR BENNETT:** No, there were several factors. Number one, once the vote was over, everybody was sick of this and they wanted it over. I was besieged with reporters, and I said, "It's over. Go home. Get a life." . . . That was the only time I've been picked up in *Time* magazine and they listed it with the week's top quotes. Bob Bennett, and the identifying line strip said, "The President's lawyer." My 15 minutes of fame was stolen from me.

There were several factors. That was the overwhelming one. People wanted it over. There were senators, led by Phil Gramm of Texas, who earnestly and fervently believed that this was unconstitutional, and Phil used all of his abilities and rights as a senator to block it ever coming to a vote. As long as he had 40 votes, which he did, that would guarantee that it would never come to a vote. I kept telling Diane, "Look, this is inevitable. Let's not try to fight Phil on this. Let's just gather as many cosponsors as we can, so that it's a matter of historical record with the cosponsors," and we filed it with those cosponsors on it.

The other factor there, and I must be honest about it, as it became clear that the White House was going to win the trial, Democratic senators who had previously been very enthusiastic about our efforts for a meaningful censure resolution suddenly began to find reasons to drop off. The White House no longer felt they needed this for political cover, and those senators who were responsive to the White House on political reasons then disappeared. Many of the original people who had told me absolutely they would cosponsor and fight for the resolution were not there when the time finally came.

**CONGRESSMAN CANNON:** Let me just say that it's possible to have a negotiated agreement and censure for the president where you have what's essentially a bill of attainder. I only believe that would have been a very bad precedent for American history. So that's where we had a slight disagreement as to that. Senator Bennett and I, of course, may have argued over the appropriateness of impeachment versus censure, but what he has said is correct. We could have censured the president. My argument was that impeachment was more appropriate.

\* The full transcript of the panel discussion is published in the December 1999 issue of *BYU Law Review*.

that each member of Congress takes to uphold the Constitution *requires* a determination of the proper interpretation of "high crimes and misdemeanors" "*because the maintenance of the quality of the executive that the constitutional structure demands is part of his or her job*"<sup>25</sup>

In addition to their discussion of the textual and historical arguments noted above, commentators offered competing positions on questions of policy. One refrain repeatedly offered by the president's defenders was the notion that impeachment ought to be avoided since it would overturn the will of the people expressed in the 1996 presidential election. Others expressed the concern that conviction of the president would convert impeachment into a "legislative weapon" to be used any time any future president is involved in any scandalous conduct.<sup>26</sup>

Other commentators refuted some of the pragmatic arguments offered in support of impeachment: that impeachment was a distraction from the "real business of government" or a drastic attempt to overturn the results of the last presidential election. On the first point, one scholar argued that the focus on the "real business" of government was a straw man—that the Framers' "paramount concern" was "for the integrity of public officials," and that the "prosperity and stability of the Nation ultimately rests on the people's trust in their rulers."<sup>27</sup> As to the second, another commentator noted that "presidential impeachment almost always will 'overturn' the results of the last presidential election."<sup>28</sup>

#### **JUDGES AND PRESIDENTS: IS THERE A DIFFERENT STANDARD?**

The historic vote of the House of Representatives ensured President Clinton an infamous place in history as one of only two presidents ever impeached. Because the majority of impeachments in American history involved federal judges and other nonpresidential figures, several scholars turned to the precedent of those impeachments for guidance in the impeachment of President Clinton. If applicable, those precedents seemed to undermine the narrow impeachment standard offered by the president's defenders:

none of the judges impeached on charges of perjury ever argued that perjury did not rise to the level of an impeachable offense, and neither house of Congress seemed to have required that the conduct stem from an abuse of public (judicial) power.

President Clinton's defenders made a number of attempts to distinguish the judicial impeachments. Some argued that the Constitution's provision of life tenure for judges should require a correspondingly more liberal standard of impeachment for judges. Others pointed to the "good behavior" clause, which assures that federal judges "shall hold their Offices during good Behavior," in support of the conclusion that "there is a lower threshold for judges than for presidents."<sup>29</sup>

#### **THE CENSURE ALTERNATIVE**

Over the course of the 13-month impeachment ordeal, members of both the House and Senate debated the propriety of a censure resolution to punish President Clinton for his conduct. Some members believed that censure was an effective and more politically palatable alternative to impeachment. Although they were loath to convict the president, they did not "want the vote to acquit viewed as a vote to exonerate."<sup>30</sup> Many saw it as Senator John D. Rockefeller did—as an effective way "to say to myself and my people, 'What he did was wrong.'"<sup>31</sup>

Other members opposed censure on the ground that the impeachment clause provides for conviction and removal as the sole remedy for presidential misconduct<sup>32</sup> and because they feared it would set a weak precedent for dealing with the delinquent conduct of future presidents. Senator Larry Craig of Idaho explained, "Most of us look at [censure] as a raw political cover. It's nothing more than a slap on the wrist."<sup>33</sup> Other senators, like Phil Gramm of Texas, expressed the concern that the precedent created by a censure resolution could come to be seen as the easy way out of any difficult political decision in the future and could weaken the constitutional separation of powers.<sup>34</sup>

Legal scholars also offered competing views as to the constitutionality of censure. On one hand, some commentators

noted that impeachment was the sole sanction prescribed by the Constitution. Article II provides that the president "shall be removed from Office" upon impeachment and conviction. Article I states that "judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States." Without more, some scholars concluded that the Constitution should be read to "contemplate[] a single procedure for Congress to deal with the derelictions of a civil officer" and to rule out all others.<sup>35</sup> Others went even further in arguing that censure would constitute an unconstitutional "bill of attainder" and violate the constitutional separation of powers.<sup>36</sup>

Others commentators found no constitutional prohibition against censure, arguing, in fact, that "every conceivable source of constitutional authority—text, structure, original understanding, and historical practices—supports the legitimacy of the House's and/or the Senate's passage of a resolution expressing disapproval of the president's conduct."<sup>37</sup> Specifically, one scholar asserted that by providing an upper limit in the Constitution to what Congress may do in cases of impeachment—that "Judgment in Cases of Impeachment shall not extend further than to removal from Office and disqualification to hold or enjoy an Office of honor, Trust, or Profit under the United States"—but not a lower limit, the Framers intended to allow for judgments that fall short of actual removal and disqualification, including censure.<sup>38</sup>

#### **THE ROLE OF PARTISANSHIP IN THE IMPEACHMENT PROCESS**

Critics of the Clinton impeachment berated Republicans for proceeding with an impeachment that lacked bipartisan support. In asserting that a partisan impeachment lacks constitutional legitimacy, some called attention to the Framers' fear of "partisan manipulation of the impeachment process" in their review of impeachment history.<sup>39</sup> Others noted that Alexander Hamilton had cautioned against the "great[] danger" that "the decision [of impeachment] will be regulated

more by the comparative strength of the parties than by the real demonstrations of innocence or guilt."<sup>40</sup>

In response, some scholars contended that the above statements were not intended as a broad condemnation of impeachments lacking bipartisan support; they merely indicate the Framers' recognition of the inevitable realities of impeachment. After all, although Hamilton acknowledged that impeachment might become so partisan as to "enlist all the animosities, partialities, influence, and interest on one side, or on the other," the Framers ultimately concluded that such a proceeding was preferable to leaving a tyrant in office.<sup>41</sup> Instead of running away from the partisan realities of impeachment, the Framers adopted important constitutional safeguards that were designed to manage them. They divided impeachment responsibilities between the House and Senate. The assignment of the power of conviction and removal to the Senate seemed doubly designed to manage partisanship—in that the Senate is thought to be the body of Congress furthest removed from partisan influence and in that removal requires a supermajority.<sup>42</sup>

Notwithstanding these safeguards, many were surprised by the degree of partisanship that persisted in the impeachment of President Clinton. In an August 1998 poll conducted by CBS and the *New York Times*, 65 percent of surveyed individuals approved of the president's job performance.<sup>43</sup> In late September, a similar survey showed that only 31 percent of those surveyed believed that Congress should proceed with the impeachment hearings.<sup>44</sup> Throughout the process, the president's approval rating remained high; during the Senate trial almost two out of every three Americans approved of President Clinton's job performance and did not want to see him removed from office.<sup>45</sup> These poll results seemed to encourage the president's defenders.<sup>46</sup>

Several senators cited the high poll numbers to explain their votes to acquit President Clinton. Senator Robert Byrd, in particular, stated, "In the end, the people's perception of this entire matter as being driven by political agendas all around, and the resulting lack of support

for the president's removal, tip the scales for allowing this president to serve out the remaining 22 months of his term, as he was elected to do.<sup>48</sup> Some legal scholars also used the president's popularity and the results of the November 1998 election to buttress their criticisms of those who pushed for Clinton's impeachment.<sup>49</sup>

A few participants questioned the relevance of popularity and prosperity in an impeachment trial. One scholar noted that "the Framers recognized that officials who should be impeached and convicted may not only remain popular in the face of serious charges, but even after conviction."<sup>50</sup> Senator Pete Domenici responded to Senator Byrd's comments during Senate deliberations frankly: "Popularity is not a defense in an impeachment trial."<sup>51</sup> Senator Gordon Smith of Washington similarly stated, "I cannot will to my children and grandchildren the proposition that a president stands above the law and can systematically obstruct justice simply because both his polls and the Dow Jones are high."<sup>52</sup>

## CONCLUSION

In the end, the Senate's decision not to convict President Clinton tells us very little about the legal standards applied by individual senators, much less about the standards adopted by the collective body as a whole. The record contains their statements and deliberations, and in some instances (including those noted above) those deliberations offered a window into their individual views on the important legal questions addressed above. Perhaps we can presume that they found one or more of the arguments of the president's defense team slightly more persuasive than those of the House managers, but every senator probably processed and weighed the issues differently. The task falls upon legal scholars to find some constitutional order in the aftermath of President Clinton's impeachment trial. Excerpts from a transcript of the panel discussion are offered here with that in mind and with the hope that they will shed some light and insight on the important and meaningful legal questions that linger after the conclusion of the Senate's impeachment trial.

## NOTES

- 1 Associate Professor of law, J. Reuben Clark Law School, Brigham Young University. Thanks to Marcus Mumford and Melissa Rawlinson for their helpful assistance in preparing the introduction to the transcript of the panel discussion and to Michael Lee and Ryan Nelson for their comments on earlier drafts.
- 2 See Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 278, 284 (1998).
- 3 *Id.* at 286 (quoting 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 226 [1966]).
- 4 *Id.* (quoting 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64 [1966]).
- 5 Charles J. Cooper, *A Perjurer in the White House? The Constitutional Case for Perjury and Obstruction of Justice as High Crimes and Misdemeanors*, 22 HARV. J.L. & PUB. POL'Y 619, 629 (1999).
- 6 *Historians in Defense of the Constitution*, N.Y. TIMES, Oct. 30, 1998, at A17; see also Cooper, *supra* note 5, at 630.
- 7 *Id.* (quoting James Madison).
- 8 Gary L. McDowell, *High Crimes and Misdemeanors: Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626, 634 (1999).
- 9 *Id.* at 633.
- 10 *Id.* at 634 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 764 [Melville M. Bigelow ed., 1891]).
- 11 *Id.*
- 12 Sunstein, *supra* note 2, at 290–91.
- 13 *Id.* at 292 (noting that there were "some exceptions" in the history).
- 14 Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, in 39 OCCASIONAL PAPERS FROM THE LAW SCHOOL, The University of Chicago, at 14 (1998).
- 15 *Id.* at 14–15.
- 16 John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 652 (1999).
- 17 *Id.*
- 18 Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 GEO. WASH. L. REV. 682, 684 (1999).
- 19 Sunstein, *supra* note 2, at 282.
- 20 *Id.* at 283.
- 21 McGinnis, *supra* note 16, at 653.
- 22 *Id.* at 653–54.
- 23 Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666, 670 (1999).
- 24 116 Cong. Rec. H313-14 (daily ed. April 15, 1970) (statement of Rep. Gerald R. Ford).
- 25 Presser, *supra* note 23, at 676.
- 26 Cass R. Sunstein, *Impeachment and Stability*, 67 GEO. WASH. L. REV. 626, 699 (1999).
- 27 McGinnis, *supra* note 16, at 665.
- 28 Michael Stokes Paulsen, *I'm Even Smarter than Bruce Ackerman: Why the President Can Veto His Own Impeachment*, 16 CONST. COMMENT. 15 (1999).
- 29 Sunstein, *supra* note 16, at 709; compare *id.* at 708 (arguing that the good behavior provision does not permit that judges may be removed from office for bad behavior) with Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 34 (1999) (arguing that the good behavior and impeachment clauses provide that federal judges may serve for life subject to removal either for an impeachable offense or for bad behavior).

- 30 David Broder, *Don't Hide Behind Censure*, WASH. POST, Feb. 9, 1999, at A17 (quoting Senator Susan Collins of Maine and others who supported a censure resolution in the Senate).
- 31 *Id.* (quoting Senator Rockefeller).
- 32 Cf. Robert Bork, *Read the Constitution: It's Removal or Nothing*, WALL ST. J., Feb. 1, 1999, at A21.
- 33 James Carney & John Dickerson, *Waiting for the Bell with the Trial Nearly Over, Senators Look to the Door. But Will They Censure Clinton Before They Bolt?*, TIME, February 15, 1999, at 30.
- 34 See Broder, *supra* note 30, at A17; Edward Walsh, *Senate Puts Censure Resolution on Hold*, WASH. POST, Feb. 13, 1999, at A32.
- 35 McGinnis, *supra* note 16, 67 GEO. WASH. L. REV. at 662.
- 36 Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647, 724–25 (1999) (footnotes omitted).
- 37 Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 34 (1999).
- 38 See Isenburgh, *supra* note 14, at 12.
- 39 Arthur M. Schlesinger, Jr., *Reflections on Impeachment*, 67 GEO. WASH. L. REV. 693, 695 (1999).
- 40 See *id.* (quoting *The Federalist* No. 65 [Alexander Hamilton]).
- 41 Daniel H. Pollitt, *Sex in the Oval Office and Cover-up Under Oath: Impeachable Offense?* 77 N.C. L. REV. 259, 266 (1998) (quoting *The Federalist* No. 65 [Alexander Hamilton]).
- 42 Miller, *supra* note 36, at 701.
- 43 See Nagourney & Kagay, *High Marks Given to the President But Not the Man*, N.Y. TIMES, Aug. 22, 1998, at A2.
- 44 See, e.g., Bob von Sternberg, *Minnesotans Give the Man and the Job Very Different Ratings*, STAR-TRIB. (Minneapolis-St. Paul), Sept. 22, 1998, at 10A (reporting that in a poll of Minnesota residents "[o]nly 30 percent want Congress to initiate impeachment proceedings, while 58 percent want Congress to drop the whole matter").
- 45 See Jackie Calmes, *Issues Beyond Impeachment Vex GOP About Clinton*, WALL ST. J., Jan. 22, 1999, at A12 ("[S]ixty-eight percent of Americans polled approved of the job that Mr. Clinton is doing."); Bob Davis and Glenn R. Simpson, *Senate Watchers Say the Odds Favor Clinton, But a Turn of Events May Mean All Bets Are Off*, WALL ST. J., Jan. 8, 1999, at A20 ("Democrats are sticking with the president, in part, because of Mr. Clinton's astonishingly high approval ratings from the public. Roughly, two out of three Americans say they don't want him removed from office.").
- 46 See David S. Broder, *Should Such a President Remain?*, WASH. POST, Dec. 11, 1998, at A31.
- 47 Michael J. Klarman, *Constitutional Fetters and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 658 (1999).
- 48 See 145 CONG. REC. S1462-02, 1636 (daily ed., Feb. 12, 1999) (statement of Senator Robert Byrd).
- 49 See, e.g., Schlesinger, *supra* note 39, at 696 ("The results of last Tuesday's midterm election show that the impeachment drive has failed in its quest for popular support and legitimacy.").
- 50 McGinnis, *supra* note 16, at 660 (responding to the claim that "the continuing popularity of a President should insulate him from impeachment"); see also *id.* at 662 ("The underlying claim that the President should be insulated from impeachment by popular sovereignty is based not only on a historical misconception but also on mistaken premises about the way politics works.").
- 51 145 CONG. REC. S1462-02, 1502 (daily ed., Feb. 12, 1999) (statement of Senator Pete Domenici).
- 52 See Edwin Chen, et al., *Senate Jurors Begin Private Debate on Clinton Verdict Impeachment: Lawmakers Express Their Views out of the Public Eye*, L.A. TIMES, Feb. 10, 1999, at A1 (reviewing the statement of Senator Smith).



# Law Partners

BY LOANN FIELDSTED

Law school is a demanding and often stressful time for most law students—especially for those who are married. But what if both partners in the marriage are law students? Does this create even more challenges for those who attempt it? Or does it make the law school experience easier?

Many married couples have graduated from the J. Reuben Clark Law School, and others are currently enrolled. Though they must make sacrifices, they experience many positive rewards in their marriages and in their educations as they work together as “law partners” even before graduation day.

## Dreams and Sacrifices

A love of learning, an interest in the field of law, and a desire to have a career that allows flexibility and financial security are some of the reasons students pursue a law degree. Often though, a student who is a spouse (usually a wife) will quit school and find a job, to provide income for the family while the future breadwinner finishes school. But couples who choose to go to law school together accept different sacrifices, including the inevitable debt load they will incur in order for both of them to achieve their educational goals. In these marriages neither partner is pressured to give up his or her dreams.

Seth and Kara Beal, who graduated this past spring from the Law School, met on a blind date at BYU and found they

have a common link: both of their fathers are attorneys. Both Seth and Kara wanted to follow this same career path. Barely past their first wedding anniversary, they began their first year as law students. Seth believes that other than the student loan debt they incurred, they made few sacrifices. “We were both doing what we wanted to do, so neither of us had to sacrifice for the other.” Kara says that at BYU, women feel a lot of pressure to work while their husbands finish school. She’s glad, though, that Seth encouraged her to pursue her own dream. She knows that without Seth’s support, it would have been difficult to go to law school, but because of it, she never felt that she needed to forgo her educational goals.

Matt and Rachelle Fleming, second-year law students, feel the same way. They began dating during their senior year in high school, and while Matt served a mission in Japan, Rachelle thought about a career in law. A month after he returned, she left on a mission to San Jose, California. While she was gone, Matt made his decision to study law. When she returned, they married, finished their undergraduate work, and began law school. Obligated to student loans, they are grateful for partial scholarships. Matt feels that two law degrees in the family is “an insurance policy on the future” against death or disability.

Other second-year law students John and Hannah Smith met during their freshman



year at Princeton University but didn’t marry until after they had both graduated from college and served missions. Hannah knew she wanted to go to law school after serving as a lawyer in a mock trial in sixth grade. Her dream to be an attorney led her to successfully compete on her high school debate team. John’s decision to study law was actually influenced by his wife’s prior decision. He says that Hannah “radiated enthusiasm for law as a profession in which one could use certain skills—critical thinking, policy background, and persuasive expression—to promote fairness, opportunity, and enlightened rule-making.” Admitting that law school is a financial sacrifice for them, John says, “We budget carefully and take good care of what we have so it lasts at least until we begin our first jobs.”

Scott and Velvet Poston decided to go to law school before they met. (They started dating while they were both members of Living Legends.) Born in Guatemala and raised in Provo, Velvet saw the struggles of minorities and wanted to help them. Scott’s interest in law is based on a desire to provide a good future for his family. They studied for the

**Second-year law students Matt and Rachelle Fleming enjoy studying together.**

LSAT together, and during that time they decided to get married. Velvet laughs that they weren’t very effective in studying but were very effective in developing their relationship. They married the summer before they began law school. Unfortunately, complications of pregnancy and an emergency appendectomy made it necessary for Velvet to defer her first year of law school. This setback alone would be enough to deter many couples from continuing with school, but after giving birth to their daughter, Madelyn, Velvet went back this past January to retake the classes she had withdrawn from during her pregnancy. She has started her second year of school, just one year behind Scott.

Samuel and Brooke Harkness also made the decision independent of each other to attend law school. Because her father is U.S. attorney for Utah, Brooke grew up watching his trials and knew at an early age she wanted to do the same thing. When she met Sam at BYU, she had already been accepted to the J. Reuben



Clark Law School. Sam also had always planned to pursue a law degree, but he wanted to go to school outside Utah. When he and Brooke decided to get married, however, he applied to BYU. They were married last December after Brooke's first semester, and Sam began his first year this fall.

Carter and Sara Chow met as freshmen at BYU and became good friends, but they weren't married until after they both served missions. Before her mission Sara took the MCAT and had plans to pursue a career in medicine. But while she was serving, her focus changed. She decided it would be difficult to balance family and a medical career, and she contemplated going to law school. Sara felt that a law degree would enable her to practice law (maybe even from home) and still take care of a family. Carter chose to pursue a career in law because of an interest in international law that developed while he was serving a mission in Japan. The Chows began their first year of law school this fall and are living with Carter's family to save money. Sara testifies, "Law school is demanding, but doing it as a couple makes it much easier."

Gabrielle Turner was influenced by her husband, Benjamin, who had always dreamed of a career in law, to pursue a law degree herself. After he graduated from BYU with a degree in economics, he was accepted to law school. When his part-time summer job as an actuary turned into full-time work, his employer offered to pay for him to go to law school at night. As Gabrielle, who was employed as a nanny, contemplated how busy Ben was going to be, she began thinking about law school

herself. She also wanted to secure an education that would eventually help them financially. The couple have experienced much disappointment in starting a family and have found that fertility treatments are extremely expensive. They hope that their law degrees will eventually help them pay for medical procedures to help them become parents. Ben and Gabrielle have also learned of the enormous expense involved in adoption. Some day Gabrielle would like to use her degree to help others by providing minimal attorney fees for adoptions. The Turners began their first year of law school this fall.

### Other Challenges

Financial struggles are not the only sacrifices married law students encounter as they strive to reach professional goals. For example, Kristy Brookhart relates that because she and her husband were both so wrapped up in the demands of school, neither could ease the pressure of parenthood or law school for the other. Since both partners were feeling the same pressures, no one was there to put things in perspective. Matt Fleming agrees and admits that he and Rachelle feel stressed out at the same time, as opposed to just one of them feeling the stress of law school. John Smith says that as he and Hannah cram for the same deadlines and exams, they depend on each other for encouragement and help when they have the least time to do so, but they have learned to "lighten another's burden when [their] own yokes seem heaviest."

Alyssa Owen recalls an experience she and her husband, Brandon, shared during

their trip to Utah to start law school this fall. They both had a lot of concerns about the move. He was worried about starting law school, and as a second-year law student, she was worried about the prospect of interviewing for jobs during the school year. Almost simultaneously they looked at each other and said to the other, "Can you help me?" They realized that with both of them in law school, they had the same concerns and weren't able to offer a different perspective to relieve the burden of the other. Brandon had been able to help her during her first year, because he hadn't been a student himself; but she knew she couldn't help him now during his first year, because she still needed help.

Finding time to have fun together is another problem. Chris Brookhart admits that marriages involving two law students are different from most marriages. He relates that he and Kristy were consumed with school and had no leisure time. Chad and Angela Fears, who graduated in April, also say they "let school take over [their] lives." There were no date nights or other activities. Chad wishes they had joined a gym, so they could have had some kind of recreation. Both wish they had done more fun things, like go on picnics. They were so busy with school, they admit, they didn't even take time to unpack their wedding gifts.

### Survival Techniques

So how do married law students survive the demands on their finances and time? Brandon and Alyssa Owen joke that since their daily conversations are usually about

law subjects, they set aside Wednesday nights from 9:40 to 10:00 to talk about subjects other than law. She says, "When those 20 minutes are up, though, we get right back to breach of warranty!" John and Hannah Smith say that church and community volunteer work, reading a newspaper, and going to campus concerts help keep their perspectives grounded in reality. Because Matt and Rachelle Fleming have also sacrificed doing fun things together, they have conscientiously made an effort to make the things they *have* to do more fun. They know that if they don't, fun times may not come until after they graduate.

The Turners take their minds off schoolwork by working on the house they bought. Gabrielle admits that because of this project, they don't have a lot of free time, but the time they spend working together actually helps keep them sane and gives them something to think about other than school.

### Competition

Couples learn ways to cope with the stresses of law school, but how do they cope with the issue of competition in the law school environment?

Interestingly, married couples are generally supportive of each other and the goals they share, and they feel little or no competition with each other. Chad Fears says that he and Angela didn't compete in school because they have strengths in different areas. In paper classes Angela received grades better than Chad's, but in test classes, he did better. Chris and Kristy Brookhart say there wasn't any competition between them, because

they went to law school with different purposes in mind. He wanted to do his best so he could support his family, but Kristy went to expand her education and do something fulfilling.

Kara Beal, however, admits that she felt some competition with Seth during their first year of law school. Since they studied together, they basically knew the same things going into exams. Kara says, "It can be disturbing if you don't do as well as your partner, but exhilarating if you do better." She overcame this competitiveness by facing grades and class rank repeatedly and realizing that she just needed to do as well as she could.

Competition isn't only about grades. The Beals had to learn not to take things personally if they disagreed on a law subject. During mock trial competitions, they argued different sides—for three weeks! Kara says these were the worst three weeks of law school. They came to realize the importance of helping each other and working as a team to accomplish their personal goals. Hannah Smith agrees. "It would not work well if we viewed law school as anything other than unselfish teamwork." Gabrielle Turner says they don't compete. In fact, she feels bad if she does better than Ben. She wants him to do well simply "because he is [her] husband."

### Relationship Benefits

Such an unselfish attitude is one of the reasons married couples who attend law school together say there are more positive than negative aspects to the arrangement. All nine couples profiled feel that for many reasons their marriages have been strengthened because of

their law school experiences. For example, since both partners are in school together, they have empathy for each other. Angela Fears observes, "It seems to be more difficult for couples with one partner in law school. With us, neither one gets upset because the other is studying or consumed with school. We can give each other more slack."

Brooke Harkness admits that if she wasn't a law student, she might be hurt or angry about the amount of time Sam spends at the library—especially on Saturdays—but since she went through the same experience last year, she's very understanding. Seth Beal believes that stressful times, like finals, were made easier when he and Kara were in school, because there weren't outside pressures from a spouse who couldn't quite understand. "We were experiencing the exact same feelings," he relates, "and were able to have more understanding." Kristy Brookhart admits that since Chris began law school a year before she did, she didn't really understand what he was going through until she actually did it herself.

Rachelle Fleming is glad for the opportunity she has to go to law school with Matt. She knows that it would be hard to be the spouse at home—or the spouse at school *worrying* about the spouse at home. Matt agrees and says, "Law students whose spouses don't go to school often feel pressure to be at home. They feel like they are a neglectful spouse or father or mother. They also feel they must limit extracurricular law school activities in order to be home." Even though Matt realizes that he and Rachelle feel the same stresses as other cou-

ples, he acknowledges that they don't have to deal with the element of the neglectful or neglected spouse.

Another reason law student couples feel their relationships grow stronger is that they spend most of their time together. When the Chows decided to go to law school, people told them they would never see each other. They have found the opposite to be true, since they are rarely apart at home or at school. In their legal studies John and Hannah Smith share their impressions after class, make outlines together, quiz each other, and push each other to be the best each can be. On the home front, they have divided up their household tasks and have weekly planning sessions. On the Church front, they support each other in their respective callings: John as gospel doctrine instructor and Hannah in the Relief Society presidency. Hannah says, "John and I strive to create a true partnership in our marriage and, for us, it has worked out beautifully to attend law school together."

Ben Turner believes that the law school experience gives him and Gabrielle the opportunity to work on a relationship that will go far beyond the three years it takes to receive a law degree. He acknowledges that after law school most students lose touch with those they were close to, but he and Gabrielle will still be together and will have shared memories of this educational experience.

One time Alyssa Owen, whose study carrel is next to her husband's, noticed that



**Samuel and Brooke Harkness each chose law school before they met.**



**Taking law classes together is part of the teamwork of John and Hannah Smith.**



**Gabrielle and Benjamin Turner began law school this past fall.**

**Brandon Owen feels he is a better student because of his wife, Alyssa, also a law student.**



other married male law students had pictures of their wives hanging in their carrels, and she asked Brandon why he didn't have one of her. He told her, "I don't need one. I have the real thing." Similarly, the Postons enjoy going to school together. With Scott finishing law school a year ahead of her, Velvet admits that she'll miss him when he begins his practice. She says, "We understand each other, and it's great to spend so much time with my best friend."

Likewise, Seth and Kara Beal took all of their classes together and studied together. Seth says, "Other couples who don't attend law school together must set aside time to be together. In our case, we had to make an effort to set aside time *not* to be together, so we could pursue interests we don't share."

Because couples spend so much time together, they must learn how to get along. Since they both have the same time commitment, there is a lot of negotiating—especially about

household chores. Kara Beal says that while they were in law school she'd kid Seth that it would be nice if she had a wife. She knew married men friends at school whose wives would fix them lunch and keep the house clean, but this extra support at home isn't as easy when a spouse is a fellow law student. Alyssa Owen jokes that they have a system regarding household responsibilities: They just don't do it! She says they are basically in a survival mode. Because she has already completed her first year of law school, she understands what Brandon is going through and is willing to do more of the household chores right now in order to make it easier for him. Alyssa says she doesn't mind, though, and describes herself as a "stress cleaner": she finds that cleaning and doing laundry relieves the stress she feels from school. Similarly, Brooke Harkness does most of the household chores. She feels that she has less to do than Sam, and she also remembers how difficult the first year is. She doesn't mind taking on the extra responsibility right now.

Another marital benefit that comes to a couple who attend law school together is better communication. The Brookharts say it is easy for them to communicate, because they share the same vocabulary and knowledge base. It is one of the reasons Ben Turner encouraged Gabrielle to go to law school with him. He says that when he was working as an actuary, it was difficult to talk about his work. Ben feels that spending time with his wife and sharing conversation about things that are of interest to both of them is a great part of marriage. They will also be able to understand

the demands of each other's profession, because they will both be familiar with those demands. In fact, Ben would even love to have a law practice with Gabrielle. Matt Fleming recalls how nice it was this past summer when he and Rachelle came home from their respective summer externships to be able to talk about what they had learned.

### **Academic Benefits**

Couples feel that their educations benefit because they are in school together and often take the same classes. Seth and Kara Beal took many classes together and feel they both did better in school because they relied on each other's strengths. Seth says that Kara is a better writer, so she edited his papers for grammar. He, on the other hand, is good at organizing. He says they often joke that together they would be the perfect attorney. Matt Fleming also feels that he wouldn't have done as well during his first year of law school without his spouse. Because he and Rachelle took classes and studied together, they were able to help each other. Often there were concepts Rachelle understood that he didn't, and vice versa.

By taking the same classes, law student couples not only have a built-in study partner but also can save money on books. Of course, taking the same classes often requires negotiation. The Beals were both interested in different areas of law (Seth in litigation and Kara in corporate law) but decided to compromise and find classes both were willing to take. Both also worked on the *BYU Law Review*. They feel that in the long run their collaborating paid off.



Taking classes together during their first year of law school worked so well for the Smiths, they opted to do it again this fall, even though they could have chosen their own schedules. As John puts it, "If it ain't broke, why fix it?" Not only can they study with each other, but they can cover for each other when needed. John explains: "Our parallel pursuit of the law allows us to cover for each other on a day when some other calling takes priority, e.g., when I was asked to translate for general conference and foreign delegations to Church headquarters, Hannah attended classes and took notes."

Another academic benefit comes from having a partner who is also committed to school work. Brandon Owen feels that if Alyssa wasn't going to law school, too, he might be more relaxed about his study habits. When both partners are immersed in the rigors of studying law, there aren't as many distractions or excuses. Sam Harkness believes he is a better student because of his wife. He says that last year at this time Brooke was in her first semester of law school, but they were engaged, and he was on the downhill slide in finishing his undergraduate work. He had a hard time concentrating on his studies. He admits that with both of them in law school, he is now much more motivated. Similarly, Carter Chow says that he and Sara can help each other stay focused. Since they have the same school schedules and the same assignments, they both understand that they can't go out to dinner or a movie if a paper is due.

Ben Turner feels that the law school experience is much

easier for him than it would be if Gabrielle weren't also in school. Sometimes new experiences can be intimidating, and some students may enter law school feeling somewhat apprehensive. But when he and Gabrielle began school this fall, he found, "Nothing is ever truly bad when you have someone to share the experience with. Everything is easier to do with a friend."

### Law School Parents

When children are part of the law school picture, couples find that they must be even better time managers. The Brookharts, who have a son, Liam, born last October during Kristy's second year, say they were so busy with the baby they had to study after he went to sleep. During finals, though, they negotiated study time and child care time by setting the timer for two-hour increments. When the timer went off, they traded places. That way they both had adequate time to prepare. Kristy adds that she is lucky to have siblings in the area, who also often help with the baby.

She and Chris also took advantage of the family support rooms at the Law School and tried to take classes together. They took turns being responsible for certain classes; then if the baby cried, one of them could take him to the support room while the other took notes. The note taker then taught the concepts to the absent parent that night at home, gaining a better understanding of the material by having to teach it to someone else. When they didn't take classes together, though, they arranged their classes so they could take turns with the

baby. Liam was usually with them at the Law School.

Chris admits that his class rank dropped after he became a father, but he assumed this would probably happen. He believes that anyone going to law school with a family must look at his or her priorities. Kristy says there were times when she thought about dropping out. Becoming a mother changed everything for her. But with only 18 credits left to graduate, she knows she can do it—even though Chris has already

**Carter and Sara Chow met as freshmen at BYU and married after they both served missions.**



graduated and has started work at Dow, Lohnes, and Albertson in Washington, D.C. Kristy is a single mom for a semester, but by taking extra credits she will be through with her course work in December. A friend watches the baby while she is in class, and Chris flies to Utah to see them on weekends whenever he can.

The Fears did not take many classes together after their first year, because Chad liked to take classes with a test option, and Angela liked classes with a paper option.



**Law students Scott and Velvet Poston make their daughter, Madelyn, their first priority.**

But things changed during their last semester when their daughter, Sydney, was born. They then had to work around baby feedings and class schedules. Chad admits that he actually did better in school during times of increased responsibility, like marriage and the birth of their baby. He had to have more discipline to balance all of it, and this discipline made him a better student.

As parents of baby daughter Madelyn, the Postons have found a need to separate law school from family. When they first started law school, prior to Velvet's complicated pregnancy, it was easier to fulfill school and marital responsibilities, but now Madelyn is their first priority, and they hope to make things as normal as possible for her. After a full day of school, the Postons don't do anything

relating to law school until after the baby is asleep at night. They wait until Madelyn is tucked in bed, then the books come out and study time begins. Their commitment to the baby carries over to their extracurricular activities (Scott serves as president and Velvet serves as vice president of the Minority Law Student Association. Scott is also president of the Natural Resource Law Society). Madelyn goes with them to Law School social functions so they can spend more time with her.

The Postons' also set up their school schedules to accommodate Madelyn's needs. Velvet's mother and grandmother watch the baby for them while Scott and Velvet are at school. The Postons are careful to limit classes taken at the same time to three hours per day. Other classes are taken in shifts: Scott in the afternoons and Velvet in the mornings. This way they can take turns with Madelyn.

Matt and Rachelle Fleming look forward to the birth of

their first child, a girl, who is due on Christmas Day (they hope she won't arrive until after finals!). During their first year, the Flemings enjoyed taking classes together but realize that now this arrangement will probably change. Matt acknowledges that "the baby will bring a new element to the law school experience. Parenthood will require planning and discipline of time." Matt and Rachelle plan to alternate their class schedules, so they can take turns caring for their daughter.

### **Accomplished Goals**

When two law degrees are finally attained, do couples feel that the sacrifice and struggle were worth it? Yes! The nine couples wholeheartedly agree that they would do it all over again—even if both degrees were never used professionally.

In fact, when Kristy Brookhart graduates this year, she will be in that situation. Even though she and Chris are sacrificing a lot right now in order for her to finish school in Utah while Chris works in Washington, D.C., Kristy wants to stay home with their baby once law school is behind her. She worries, though, that if she doesn't use her degree, it might be useless should she ever need to support her family. She will probably do pro bono work to help keep her skills marketable. Chris is very supportive of her and wants her to feel good about any decision she makes—whether she ever practices law or not.

Since Chad and Angela Fears graduated from law school this past spring, they moved to Richmond, Virginia, where Chad is a staff attorney for the U.S. Fourth Circuit Court. Like Kristy Brookhart,

Angela hopes to stay at home with their daughter but would like to use her law degree to practice part-time contract law.

Seth and Kara Beal also graduated this past spring and are both employed at Kirkland and Ellis, a law firm in Los Angeles. They never planned to work together and are surprised to find themselves in this situation, which they realize is temporary. Eventually they will start a family, and they feel strongly that one of them should be home with the children. Kara says that she would like to work at home once they become parents.

### **Conclusion**

Law School is certainly a challenge for married law students, but professional and personal goals *can* be realized when couples work together for a common purpose. Certainly there are financial sacrifices to make and time and family challenges to overcome, but the shared experience of going through law school forms a strong marital bond that endures beyond those three years. As Chris Brookhart says, "Going to law school together was an experience I will always remember and treasure. Even though it has been difficult at times, it is all we've ever known. The foundation of our marriage is closely tied to our experience at law school."

Even if couples never become professional law partners once they have law degrees and are ready to begin the next chapter of their lives, they have memories to share, law degrees to use if needed, and satisfaction that together they overcame great obstacles to achieve their goals.



# First Things First

**There will be many occasions where the temptation to put your pride and fear ahead of your family and church will be as acute as anything you feel in graduate school.**

**T**he question that brings us together tonight has bedeviled LDS graduate students for many years: how to balance the rigorous demands of graduate school, family, and church responsibilities. Looking as far back as the biography of J. Reuben Clark's public years, it has been a perennial struggle. Your presence here is a testament to your determination to meet it faithfully.

I vividly remember my own fears and the heartfelt conversations with my law school classmates as we talked in the hallways or pondered this challenge in the library at night. That was some time ago—as you can see just from looking at me—and we have met with varying degrees of success or failure in the ensuing years. Looking back, I can see that the way each of us chose to handle the demands of graduate school greatly foreshadowed the way we would respond to the demands of professional life. In other words, far more hung in the balance than I realized as we made decisions about how to live our lives during law school.

For most of us, graduate school presents dramatically increased demands on our time and abilities compared to our undergraduate experience. This was certainly true for me. After one week of law school, I felt a little like Dorothy in *The Wizard of Oz* after the tornado set her down. I wasn't sure

what had just happened, but I knew I was "not in Kansas anymore." It is also not uncommon, at least early on, to believe that you have been mistakenly placed in some highly advanced class in which almost everyone else has had the prerequisites, which you somehow missed. I remember feeling that it was a little unfair to put me in law school with people who obviously had practiced law somewhere for several years.

The temptation in such a setting is to decide that graduate school will require an all-out effort with nothing held back. With that in mind, I have set up my remarks as a series of three questions or concerns. These are posed by a hypothetical student I will call James (see Doctrine and Covenants 39; 40), who has tentatively decided to devote all of his time and talents to success in graduate school, while putting church and family obligations "temporarily" on the back burner. My own responses follow. As my children can attest, my answers typically go on a lot longer than the initial question.

**James:** Don't make such a big deal out of this. It's not like I'm going to leave the Church or something. I know it's true. I just need to focus on my schooling for a limited period of time, and if I do, it will set my family up for the rest of our lives. What's wrong with that?

**Response:** Implicit in your question is the idea that there is something unique or unusual about the demands of graduate school that justifies relaxing our covenants with the Lord during that time. The assumption is that you are not seeking permanent retirement from service in the kingdom, but a brief sabbatical. The fundamental premise of this question

is that you are facing a once-in-a-lifetime challenge that you will never face in quite the same way again.

That premise is false.

The temptation to put the Church on the back burner to study in graduate school is no different in quality or intensity than the temptation to do so in order to start a small business, gain a promotion, prepare for a jury trial, or maintain a tenuous hold on a job during a recession.

I use the word "temptation" deliberately. It is important not to delude ourselves that this desire to put school temporarily ahead of church and even family is some deep philosophical quandary or Abrahamic test. At bottom, it is nothing more glamorous than a temptation. Your professors have subtly planted in you the twin seeds of ambition and fear. Some of you

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BY MICHAEL MOSMAN

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have listened and have begun to feel the unappeasable hunger of a desire for worldly success and its dark side, the fear of failure—that is, the fear of being little in the world's eyes. As you must know, if you give in to these temptations this time, it will only be more difficult to resist the next time around. There will be many occasions where the temptation to put your pride and fear ahead of your family and church will be as acute as anything you feel in graduate school.

Let me use a personal example. As a young associate in a large law firm, I was pulling the laboring oar in a lawsuit that threatened to unravel a large corporate merger and do great harm to one of the firm's major clients. In addition, the basis of the suit involved allegations that our firm had made



serious mistakes in a securities offering. Two of the principal partners of the firm, the men who signed my paychecks and decided if I got to come to work the next week, were over-seeing the case. We worked endless, tense hours. I recall coming home one night quite late and being so irritated that I had not been able to mow my lawn that I turned on the porch light and mowed it while still in my suit.

The two partners and I met one Saturday. The court hearing that would effectively decide the case was early the next week. I was fully prepared; but more out of panic than necessity, the partners set another lengthy strategy session for Sunday. I had not worked on Sunday through law school and federal court clerkships, and I did not want to start then. At the same time, I was not blind to the fact that the men calling the meeting held my career in their hands, and they were not likely to be impressed that I had a Sunbeam class to teach. I could not be sure of the outcome when I told them I was ready for the hearing, that I had other obligations on Sunday, and that I could not make the meeting.

I tell you this story not to talk about the Sabbath but to show that in your careers there will be instances where the pressure to make exceptions to your gospel commitments can be very great. Those who establish their response to such pressure while still in school will find themselves better able to withstand the pressure later.

In sum, the premise of this first question is false. You think this is a one-shot deal. In reality, it is simply the first of many tests of your commitment.

The concept of taking a sabbatical from full commitment to the demands of discipleship is invalid for another reason. It misapprehends our relationship with the Lord and his Church. A vacation or sabbatical is for employees. But our connection to the Lord is described in scripture as a marriage. We would not say to our spouse: "I will always be faithful to you, except while I am in law school. I know you'll understand." Similarly, the Lord searches for those who will serve him no matter what the hazard.

There is yet another danger. We are responsible not only for what we do, but for what we

fail to do. Who knows what divine purposes brought you here to this university at this time? Who can say what great service you could render while you are here? Many of you come with gifts, talents, and energy that could be put to extraordinary use in this part of the kingdom. Single-minded pursuit of success in graduate school may cause you to miss many chances to bless the lives of those around you.

I have felt, and still feel, the great weight of things I have failed to do. It was mentioned that I was a law clerk at the Supreme Court. This was an extraordinarily busy year of my life. During that same time, I lived in a ward in Alexandria, Virginia, that experienced numerous convert baptisms of people who had just come to this country from Liberia. I was assigned to home teach a fairly new convert who had been brought into the Church by a great member missionary named Emmanuel Dufur Donka. During a particularly busy time, I missed home teaching this new brother one month. I hasten to add that I was taught better by my father, and this was the first time this had ever happened to me. The next month, I tried to arrange a visit. During that time, he had quit coming to church, and had moved, and I could not find him. That experience, deeply painful to me to this day, brought home to me what President Taylor taught: that we must answer for those who were within our sphere of influence whom we failed to help.

There is another, even more fundamental reason to avoid spiritual sabbaticals. They can result in an undetected yet dangerous weakening of our

testimonies. Most of us have an emotional attachment to having a testimony. Once we gain a testimony, we do not like to think of ourselves as having lost it. For this reason, many people do not face the fact that their testimony is dying until it is almost too late. Recently I have learned a little about concrete. One of the things I learned is that a crack in the concrete is often not the first sign of a small problem but nearly the last sign of a very big problem. Testimonies can be the same way. President Kimball once said that a testimony is as hard to hold as a moonbeam. For some of us, that light is very nearly extinguished before we acknowledge there is a problem.

What to do about the loss of testimony is the subject of another day. But if it is happening to you, do not deceive yourself. You are not losing your testimony because your newly honed powers of reasoning have cast the gospel in a harsher light. If I have learned anything in the practice of law, it is that the so-called "powers of reason" serve the purposes of liars and self-deceivers at least as well as they serve the purposes of honest men. If your testimony is dying, it is because you have neglected it.

It is my firm belief that the very things we hold back from God eventually become the source of some of our greatest sorrow. Do not hold back your school years. The law has been called a jealous mistress. As with any mistress, you will, if you give in to her, eventually despise her. I predict that if you hold back your graduate school years from God, you will eventually come to loathe your career. Its shrill demands

**The choice is not between fame and obscurity, or between wealth and poverty, but between GOOD and EVIL.**

will become odious to you. Put them on the altar instead, and let God sanctify them for you.

Finally, unless you are aware, you will permanently lose precious family moments. They go, and they do not come back. Each child, at each stage, is like a beautiful mirage, melting into the next phase and never to be captured again. Do not squander any stage; the memory of them will one day be more precious to you than diamonds, and your absence from any of them will weigh heavily on your heart.

I know of a man who turned down lucrative job offers in major eastern cities in order to come to a smaller western city where he could spend more time with his family. The difference between the highest offer he turned down and the one he took was about \$52,000. Knowing that he would probably have most of his weekends free, he referred to it as "a thousand dollars a Saturday." This man chose wisely. I have had many Saturdays that I would not trade for a thousand dollars. Over the course of your careers, you will learn that you can exchange your time for money. Try to learn the corollary expressed by Chief Justice Rehnquist that you can also exchange your money for time.

**James:** I would like to live my religion fully, but I am afraid. Graduate school is hard. What if I don't graduate high in my class? What if I don't finish at all? How will I get a job? If I don't give it everything I've got, what will become of me?

**Response:** I don't know. But when faced with a significant challenge, you can trust in your own strength, or you can trust in the Lord. I never had so much confidence in my own intelligence and abilities that I felt I could go toe-to-toe with the competition with only my wits to back me up. I knew I needed the Lord's help.

**James:** But some who do as you say don't do well, and they struggle to find jobs.

**Response:** True. It is misleading to think that if you put the Lord first during school that you will be a big success and

it can keep us from the pinnacle. Faithful Saints, including some of you, experience struggles and setbacks and even failure. But their overwhelming testimony is that God has helped them and blessed them in priceless ways that they would not have known otherwise. And when trials come—the wayward child, the bout with cancer, the financial reversal—they know where to turn and in whom they have put their trust. They know where to find him, because they have steadfastly been true to him.



become rich and famous. There are, in fact, great numbers of righteous Saints in all walks of life who have accomplished less than they might have in their public lives because of their commitment to the Church and their families. It is true, as has been said, that religious devotion is no excuse for professional mediocrity. But while it does not excuse mediocrity,

I challenge you to compare their lives to the empty existence of so many of the senior partners I have known, who have given up everything for their careers. In the end, it has left them with nothing that lasts, and it shows in their eyes.

John Lund, who once served here as a bishop, taught that we should never abandon what we know because of what we don't know. You don't

know what will happen in your careers if you keep God first, and you have no promise that you will be either rich or famous. But you do know that this is God's church and kingdom, that your time on this earth is precious, and that you are here to prove that you will freely choose God over the honors of this world.

Ultimately the choice, as Elder Packer has said, is not between fame and obscurity, or between wealth and poverty, but between good and evil.

Don't get me wrong. I love my work; I consider it a great privilege to have the job I do. But at a very fundamental level, I do not care if my commitment to the Savior costs me success in my profession. As Paul said, I would "suffer the loss of all things, and do count them but dung, that I may win Christ" (Philippians 3:8). But let me say also to you that my witness, and the witness of many others who could stand before you, is that in trying to put God and family first, God has sanctified my career for me—given me greater opportunities for service, enhanced my abilities, and protected me from harm. In short, I have been utilized by him, even in my career, to help build the kingdom of God on the earth. May he do so for you, and may you allow him to do so, is my prayer.

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*This address was given at a stake fireside for University of Idaho and Washington State University graduate students in October 1992.*



Justice David Souter of the United States Supreme Court called Rex E. Lee “the best Solicitor General this nation has ever had.” Speaking to a gathering of all 50 state attorneys general shortly after Dean Lee’s death in March 1996, Justice Souter was asked how advocacy before the high court had changed in recent times. He responded:

*“Well, I can tell you that the biggest change by far is that Rex Lee is gone. Rex Lee was the best Solicitor General this nation has ever had, and he is the best lawyer this Justice has ever heard plead a case in this court. Rex Lee was born to argue tough cases of immense importance to this nation. He set new standards of excellence for generations of lawyers and justices. No one thing has happened to change the nature of advocacy in this court that has had as much impact as the loss of that one player.”*

In memory of Dean Lee’s finely honed skills in legal research, analysis, writing, and oral advocacy, the Law School has created the Rex E. Lee Advocacy Program. This program is the most revolutionary of the Law School’s present initiatives. The revolution so far, however, has been a quiet one. The Advocacy Program is so new and quickly developing that few outside the Law School are aware of the program’s existence. The emergence of the Rex E. Lee Advocacy Program is a great story, one with the same aura as the story of the creation and development of the Law School itself. It seems that old Rex Lee magic is at work again.

To Dean Lee’s way of thinking, the fundamental skills

in the practice of law are legal research, analysis, writing, and oral advocacy. Those are the core competencies. Historically, however, American law schools did relatively little to develop those core competencies in their students. But in recent years, important voices in the profession, including those of practicing lawyers, have been raised against this historic deficiency in legal education. Under Dean Reese Hansen’s leadership, the J. Reuben Clark Law School has responded to the profession’s growing call for fundamental change. That response is the Rex E. Lee Advocacy Program, the essential purpose of which is to develop in the Law School’s students the core competencies of legal research, analysis, writing, and oral advocacy.

In April 1997, Dean Hansen tapped Professor Constance Lundberg to develop a lawyering skills program worthy of Rex E. Lee’s name. Professor Lundberg, along with Kristen Gerdy and Lovisa Lyman, surveyed the outstanding programs in the country, adopting the best features of those programs and adding to them creative, original ideas. At the start of school in August 1997, the Advocacy Program welcomed its first students, the newly arriving class of 2000. By the following school year, the program was hitting its stride and featured a teaching faculty of superb credentials, including Monte Stewart. In April 1999, the Law School designated Professor Stewart as the Advocacy Program’s first full-time director.

Presently the program is most fully developed in its teaching of the first-year law students. This teaching focuses unrelentingly on the funda-

mental skills of legal research, analysis, writing, and oral advocacy, with most of the time spent on writing. The program’s professors—Jane Wise, Mary Jensen, Lance Long, Mitzi Collins, James Clafflin, and Professor Stewart—each teach a group of 26 students. With its small size, the required Introduction to Advocacy class allows for approximately one to two hours of one-on-one writing conferences each semester. That individualized attention from an experienced

teacher/practitioner is supplemented by additional one-on-one attention from teaching assistants chosen from among the outstanding upper-class students, with each teaching assistant assigned to just nine students. (First-year students have an additional “small section,” a class of 30 students.) Additionally, three experienced librarians—Gary Hill, Steve Averett, and Dennis Sears—devote a substantial portion of their time in the early weeks of both fall and winter semesters giving hands-on instruction in legal research. Equally important, the Advocacy Program makes available to the first-year students the individualized attention of a superb writing specialist, Alison Craig. She works primarily with students most able to benefit from attention to the fundamentals, students such as those for whom English is a second language or those with less rigorous writing experience in the years immediately before their law school years.

# The Quiet

The basic teaching device used in the Introduction to Advocacy course is highly effective. That device is a true-to-life “problem”—a case with characters who seem to come alive as the students learn to represent those characters in their particular legal challenges. In one problem, a drug-abusing father and a homosexual mother with

## The Rex E. Lee

a live-in lover engage in a battle for custody of their two young children. In another problem, a man who may or may not be a public figure sues over allegedly defamatory statements made in an on-line chat room. (See the sidebar for a detailed description of another problem currently being used.) The students’ representation begins with an interview in a law office conference room where the “client” pours forth a flood of facts, opinions, and emotions. The representation continues through both fall and winter semesters and ends with an oral argument before an appellate panel in a moot court setting.

Between that initial interview and the oral argument, the students focus on legal research and writing. Creating a number of drafts for each assignment, they write (1) an intake memorandum stating the facts of the case, (2) an office memorandum predicting the likely resolution of each of the various issues, (3) a trial or motion memorandum, and (4) an appellate brief.

# Revolution:

The impact on first-year students has already been dramatic. In the summer immediately after their first year, many of the students work in the profession as externs, interns, or clerks. They are called upon to research and to write. The reports on their performance have been almost universally enthusiastic and positive. The students return in late August voicing testimonials on the value of their first year in the Rex E. Lee Advocacy Program.

Attention to the enduring core competencies of the profession would be inadequate in

books). Teachers are using their laptops in the classroom for everything from PowerPoint presentations to on-screen editing exercises to the use of movie clips.

A recent teaching exercise by Professor Stewart demonstrates the nature of the Advocacy Program's "fully wired" classrooms. At their seats, the students connected their laptops to the Net. Professor Stewart sent each a paragraph from an anonymous student paper electronically filed just the day before and, at the same time, projected the paragraph on the screen. He led the students through a discussion of the strengths and weaknesses of the paragraph and then gave them 10 minutes to revise it. At the

short answer is challenging: the funds come from a number of sources with one thing in common—they are temporary. In other words, the Law School has "moved forward with faith" to do what it deems essential for the professional training of its students. Permanent funding in the form of gifts will enable that training at this high level to continue and to be extended to students in their second and third years.

As envisioned, the Rex E. Lee Advocacy Program will play a key role in the education of second- and third-year students. The training will center on the cocurricular programs and in skills classes, such as trial advocacy and advanced legal writing.

Advocates. The initial purpose of the alliance is to provide first-year law students with a superior moot court experience in the first-year moot court competition (the primary entree onto the Board of Advocates). The alliance also opens the way for members of the Board of Advocates, together with the Advocacy Program's teaching assistants, to mentor first-year students in the weeks leading up to their moot court experience in March. The alliance's ultimate objective is to make *BYU's* moot court team national champions, a goal to which the team has been moving steadily closer.

In light of the Advocacy Program's abundant legal writing resources, the Law School also anticipates a similar mutually beneficial connection between the program and the legal journals.

The Advocacy Program's advanced classes not only will deepen but also will broaden the students' professional skills. Thus, for students on the Board of Advocates, the required one-semester advanced course will

# Advocacy

itself unless coupled with attention to a large and growing shaper of the profession: technology. Technology use by both students and faculty is intense throughout the Law School but nowhere more so than in the Advocacy Program. Students use their laptops (required of every student) to file their writing assignments electronically, to engage in "collaborative editing" of another student's paper, and to send and receive a wide variety of communications pertaining to the course. During winter semester the students are immersed in computer-assisted legal research (which is forbidden during fall semester so that students will learn to use

end of the 10 minutes, they sent their proposed revisions to his laptop. He selected one rewritten paragraph, projected it on the screen, and led further discussion on the quality of the revision.

That kind of technology is available in the Advocacy Program because of the cutting-edge features of the Howard W. Hunter Library and because of the Law School's commitment of such resources to the Advocacy Program.

All these human and technological assets now at work in the Rex E. Lee Advocacy Program do not come cheap. Where have the funds for the assets come from? The

# Program

Historically, the cocurricular programs—moot court and the legal journals—have done much to develop students in the core competencies of the profession. Recognizing the common purposes of the Rex E. Lee Advocacy Program and the cocurricular programs, the Advocacy Program has already forged a close working relationship with the Board of

be in legal writing; for students on the legal journals, in trial or oral advocacy. Students not involved in a cocurricular program will have their choice.

The dream for the Advocacy Program has another intriguing facet. This program, working closely with the Lee family, can collect the papers from Rex's intense and productive life, organize and preserve those papers,



and thus provide the essential basis for a biography worthy of a great solicitor general and a man who was the best of friends to so many.

What is the meaning of all these important changes manifested in the emergence of the Rex E. Lee Advocacy Program, this necessary increase of focus on fundamental skills and core competencies? What is the meaning of all this for the outstanding academic and theory training that has always characterized legal education at the J. Reuben Clark Law School?

Rex E. Lee was firmly committed to the ideals of traditional legal education, just as he was committed to practicing law with the fundamental skills of legal research, analysis, writing, and oral advocacy honed to the keenest edge. His life manifested an artful balancing of the academic and the theorist on one hand, and of the practicing craftsman on the other hand. The Law School he founded and the Advocacy Program now bearing his name are committed to achieving that same balance in their own ongoing development.

## Tador v. Peeler

An old man, a victim of Alzheimer's disease, wanders into his kitchen, puts fish in a greased frying skillet on the gas stove to cook, forgets about the cooking fish, and goes to bed. The grease ignites. A fireball engulfs the kitchen, and smoke billows into the bedroom of seven-year-old twins asleep in the apartment above. The twins are rescued but not before they suffer serious injuries.

In the months prior to the fire, the old man's condition had led to other but far less serious accidents. The landlord knew of those accidents and their cause. A tenant had urged the landlord to do something about the risks posed by the old man's condition. The landlord, however, believed that "disability rights" prevented him from ending the old man's tenancy. Besides, the old man, whose doctor had said

he could safely live alone, was neat, tidy, and "almost the ideal tenant."

The parents of the twins bring a negligence action against the landlord in state court in Ellsworth, Maine. Who will prevail?

Presently, 54 first-year law students are grappling with these four tough issues: Should the Maine courts adhere to the traditional rule, which imposes on landlords no affirmative duty to protect in cases such as this, or adopt the modern rule, which imposes such a duty when the risk of harm is reasonably foreseeable and the landlord has the power to eliminate or control the risk of harm? If the Maine courts adopt the latter rule, should the question of foreseeability go to a jury or does this landlord prevail on that issue as a matter of law? That question repeats itself regarding this landlord's power to elimi-

nate the risk of harm. The final issue is statutory: Does the federal Fair Housing Act, which limits but does not entirely take away a landlord's power to terminate the tenancy of a disabled individual, prevent Maine from imposing liability on this landlord for not terminating the old man's tenancy prior to the fire that injured the twins?

"I have been repeatedly struck by this case's verisimilitude," says Professor Stewart, who has used the case the past two years. "The Tador case waddles and quacks just like a case in real life. It has its twists, turns, surprises, and own complexities. Although it is not an easy case for first-year law students, we expect a lot from them in their writing assignments. Of course, we also devote a lot of time and resources to aid them in their analysis and writing."

So who will prevail, the injured family or the landlord? The case's legal and factual issues are so evenly balanced that the answer is still open to debate. As Stewart tells his students, "If this were a real life case, the side with the best lawyer would win."



*The legal writing faculty of the Rex E. Lee Advocacy Program pose for a group photo. Seated, left to right: Monte Stewart, Mitzi Collins. Standing, left to right: Lance Long, Alison Craig, Jane Wise, Mary Jensen, James Claflin.*

## One Thing in Common

Full-time faculty member and program director Monte Stewart and the six part-time members of the writing faculty are a diverse group in their professional work: two writers, two solo practitioners (one criminal, one civil), a federal court judge's staff attorney, and a general litigator. They also are diverse in their off-hours work: a radio commentator, a stand-up comedian, a skateboarder-surfer, an actor, a newspaper columnist, and a photographer. What do they have in common? They all share a passionate love of teaching writing and legal writing in particular. Half of them have taught writing through English departments; the others have taught classes in history, religion, and Renaissance arts and letters. They have pooled their experiences and gifts for the benefit of the students in the Rex E. Lee Advocacy Program.

# Three Law School Alumni Called as Mission Presidents

In June of 1999, the J. Reuben Clark Law School added three names to its list of alumni who have been called to serve as mission presidents: Stanley G. Ellis, Brazil São Paulo North Mission; Robert J. Grow, California Sacramento Mission; and H. Clifford Potter, Guatemala Guatemala City North Mission. The count now stands at 16.

President Stanley G. Ellis met his wife, Kathryn, immediately before leaving for his first mission to Brazil in 1966. They were married after his return from Brazil and became the parents of nine children. Three of Stan and Kathryn's children are married, one has recently returned from a mission, one is serving a mission, and their youngest four children are with them in Brazil.

Stan graduated from Harvard University in 1972 and from the J. Reuben Clark Law School in 1976. After working for a law firm in Albuquerque, he became a financial consultant who specialized in working with closely held business owners in five areas: income tax planning/investments, estate planning, business continuity planning, employee benefits planning, and charitable planning. In addition to his professional

life, Stan served as a school board member in Klein, Texas, for six years and as a volunteer with the American Field Service exchange student program and the Sam Houston Area Council of the Boy Scouts of America. He served as a stake president for the nine years prior to his call as mission president.

When President and Sister Ellis were picking up their son Matt from his mission in Brazil in 1997, they attended the São Paulo Temple, and each had the impression that they should get their financial affairs in order as someday they would be called to serve as missionaries in Brazil. In January 1999 their call to a Portuguese-speaking mission was issued by President James E. Faust, and in late February they received word that the mission over which they would preside would be the São Paulo North Mission.

In recalling the influence of the Law School in his life, Stan relates that the analytical training he received there has helped him in his decision making and will be of assistance in the mission field. He remembers with fondness that Rex Lee taught him by precept and example to make the most of every opportunity; Dale

Whitman taught him that you can have fun with real estate; Stan Neeleman inspired him with estate planning; and Cliff Fleming taught him to take the Internal Revenue Code one line at a time.

President Robert J. Grow met his wife, Linda, in high school, and they were married shortly after he returned from his mission to the California North Mission in 1971. The two youngest of their six children are with them in Sacramento.

Robert graduated from the University of Utah in electrical engineering in 1973 and started law school at BYU that fall. The day before he started attending law classes in August 1973, he was admitted to the University of Utah medical school for fall 1974. Because he intended to enroll in medical school, some of the pressure was released from his first year of law school. It was during this year that his younger brother, David, was killed in an automobile accident while serving a mission in Pennsylvania. This was a year of soul-searching for the Grow family and a year of great spiritual growth. Robert decided not to attend medical school, and he feels indebted to his Law School associates for helping him learn how the Lord's plan works. He also

expresses gratitude to Dale Whitman, who taught him that law was interesting, a great intellectual exercise, and a lot of fun; Rex Lee for helping him see the value of pursuing dreams with all one's might; and fellow student Monte Stewart, who taught him the value of good writing.

Upon graduation from Law School, Robert was hired by two of his professors: Keith Rooker and Dale Kimball, who were returning to law practice. He remained with the firm of Kimball, Parr, Crockett and Waddoups for 11 years until he became vice-president and general counsel for Geneva Steel in 1987, eventually serving as president. Approximately 15 percent of Robert's practice was defending those who could not afford representation. These clients were found mostly by his mother, who as a nurse had spent a lifetime assisting people. He feels that the chance to make a difference in people's lives was the most rewarding part of private practice.

Robert's civic duties included his work with the Coalition for Utah's Future from 1997 until his mission call. As chair of the subcommittee on growth, Bob became the leader in Envision Utah and assisted in formulat-

ing and developing a strategy for the development of the Greater Wasatch Front through public input. In addition to his public service, Robert served as a bishop for five years and as president of the Jared Pratt Family Association for 10 years. During this time the association undertook a descendants' search that eventually gathered the names of more than 27,000 descendants of Jared and Charity Dickinson Pratt's five sons. They also submitted more than 2,500 names to the temple.

President H. Clifford Potter served his first mission in the Washington Mission (Spanish-speaking). He returned to BYU to obtain a bachelor's degree in 1975 and a law degree in 1978. He met his wife, Priscilla, in the 91st Branch. They are the parents of five children: their eldest daughter is married; they have a daughter on a mission in Campinas, Brazil; and their youngest three will be living with them in Guatemala.

Cliff has worked with the law firm of Clawson, Potter & Gardner in civil litigation for the past 21 years. Some of his fondest memories in the practice of law have been representing individuals who did not have significant resources to challenge large institutions with power and wealth and then obtaining positive results for these modest clients. He has also served as elders quorum president, high counselor, Gospel Doctrine teacher, counselor to a stake president, and for almost nine years, stake president.

In discussing how law school has helped him prepare for service as a mission president, Cliff indicated that developing the skills of a trial lawyer has made him a better teacher. This skill has helped Cliff in each of his previ-

ous Church assignments, and because a mission president's most important calling is as a teacher, it will continue to be a valuable skill.

Perhaps the most important lesson Cliff took from law school was the realization that values do not have to be sacrificed to obtain professional success. His experience in the practice has taught him that an LDS attorney can be successful and remain loyal to his sacrament covenants. Cliff remembers with gratitude the lessons he learned from his law professors Dale Kimball, Edward Kimball, Woody Deem, Carl Hawkins, and Dale Whitman. He feels that the encouragement of these men has helped sustain him over the years of his practice. He recommends *Profiles in Courage* as an antidote to the pressure law practice exerts on us to be inconsistent with our deeply held beliefs.

Presidents Ellis, Grow, and Potter and their wives are already well settled in their missions. As law school friends, we pray for their success and happiness.

#### J. Reuben Clark Law School Alumni Called to Serve as Mission Presidents

Rulon D. Munns	'76	1985-1988
E. Mark Zobrist	'76	1991-1994
Von Packard	'77	1993-1996
James J. Hamula	'85	1994-1997
Steven E. Snow	'77	1994-1997
Monte N. Stewart	'76	1994-1997
Henry K. "Keo" Chai	'79	1995-1998
Michael L. Jensen	'78	1995-1998
William H. Wingo	'76	1995-1998
Richard W. Jones	'82	1997-2000
Arlen D. Woffinden	'77	1997-2000
Robert G. Dyer	'77	1997-2000
Kevin E. Monson	'79	1997-2000
Stanley G. Ellis	'76	1999-2002
Robert J. Grow	'76	1999-2002
H. Clifford Potter	'78	1999-2002



Stanley G. Ellis, '76, and his wife, Kathryn, preside over Brazil São Paulo North Mission.



Robert J. Grow, '76, and his wife, Linda, preside over California Sacramento Mission.



H. Clifford Potter, '78, and his wife, Priscilla, preside over Guatemala Guatemala City North Mission.

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